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IN THE

Supreme Court of the United States

ZEIREI AGUDATH ISRAEL and LEVI SUFRIN,
on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

AVIS RENT-A-CAR SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's holding, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that a *prima facie* employment discrimination case under Title VII can be established by showing that the plaintiff is a member of a minority group who applied and was rejected for a job for which she was qualified, and the job remained open thereafter, also can be applied to other types of unlawful racial discrimination — which is the position taken by Courts of Appeals in the Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits — or should be interpreted as applying only to employment discrimination, the position taken by the Eleventh Circuit in this case?

2. Whether under *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), which extended *McDonnell Douglas* to employment discrimination class actions when there is a showing of a pattern or practice of discrimination, a class action challenging a company's discrimination against customers in violation of Section 1981 of Title 42 may be maintained under Federal Rule of Civil Procedure 23(b)(3) even though the discrimination does not involve employment practices and the plaintiffs seek monetary as well as declaratory and injunctive relief?

PARTIES TO THE PROCEEDINGS

The Petitioners are Zerei Agudath Israel Bookstore ("Z.A.I."), and Levi Sufrin, on behalf of themselves and a class consisting of Jewish individuals and Jewish-affiliated businesses who were subject to a company policy established and applied by Respondent Avis Rent-A-Car System, Inc. to deny them contractual benefits because of their Jewish religion, ancestry, or ethnicity in violation of Section 1981 of Title 42 ("Section 1981").

The Respondent is Avis Rent-A-Car System, Inc. ("Avis"), a car rental company.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Z.A.I., has no parent corporation and no publicly held company owns 10% or more of its stock.

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The District Court certified a class in this Section 1981 discrimination case, finding that Petitioners had satisfied the requirements of subdivisions (a) and (b)(3) of Federal Rule of Civil Procedure 23 ("Rule 23"). *Zeirei Agudath Israel v. Avis Rent-A-Car Systems, Inc.*, Petitioners' Appendix ("Pet. App.") at 32a-69a ("*Israel*").

The Eleventh Circuit Court of Appeals granted Avis' petition for leave to file an interlocutory appeal under Rule 23(f), and a panel of that court reversed, holding the District Court had abused its discretion in finding that the plaintiffs satisfied the predominance requirements of Rule 23(b)(3). *Rutstein v. Avis Rent-A-Car Systems, Inc.*, Pet. App. at 1a-31a ("*Rutstein*").

The panel held that this Court's holding, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ("*Teamsters*"), applies only to employment discrimination cases seeking only equitable relief. Under *Teamsters*, evidence of a company-wide pattern-or-practice of discrimination creates a rebuttable presumption that the denial of employment to any individual member of the protected group was also the result of unlawful intentional discrimination.

The *Teamsters* pattern-or-practice presumption is based on this Court's holding, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that in an individual case the plaintiff's initial burden to show unlawful discriminatory intent can be met by showing: (a) the plaintiff is a protected minority; (b) who applied for a job she was qualified for; (c) the defendant rejected her application; and (d) the job remained open or was filled by a non-minority applicant. This Court held, in *Teamsters*, that in a class case a showing of a pattern-or-practice was an alternative and equally reliable means of creating the presumption of unlawful discriminatory intent required to establish a *prima facie* case of employment discrimination.

The Second, Third, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeals all have held that *McDonnell Douglas* applies to individual nonemployment discrimination cases. Only the Eleventh Circuit, in this case, has held that there is a distinction between employment and nonemployment discrimination for purposes of applying the *McDonnell Douglas* and *Teamsters* burden-shifting rules.

Petitioners filed a petition for rehearing *en banc*, which was denied by Order dated August 10, 2000. Pet. App. at 70a-71a.

JURISDICTIONAL STATEMENT

This Petition seeks review of the Eleventh Circuit Court of Appeals' reversal of the District Court's certification of a class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3). This Court has jurisdiction under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISION AND RULE INVOLVED

Petitioners' claims are based on Section 1981, and this petition involves the application of Rule 23. The relevant text of both are included in Petitioners' Appendix. Pet. App. at 72a-76a.

STATEMENT OF THE CASE

A. *Introduction*

This Section 1981 discrimination case arises from a corporate policy established and applied by Respondent Avis to deny businesses and persons identified by Avis as Jewish or Jewish-affiliated the benefits of a preferred "corporate" car rental account. Avis itself referred to this as its "Yeshiva" policy.[1]

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1. The word "Yeshiva" is defined in *The Random House Dictionary of the English Language* (Unabridged Edition) as:
(Cont'd)

Petitioners Z.A.I. and Levi Sufrin brought this case on behalf of themselves and a class of similarly situated Jewish individuals and businesses denied the benefits of an Avis corporate account because of the unlawful Yeshiva policy.

Avis corporate accounts offer special advantages, including discounts, "awards" of free rentals, and rental privileges for drivers under 25 years old. Pet. App. at 34a. The evidence considered by the District Court on the class certification motion shows that Avis established and implemented its "Yeshiva policy" to weed out Jewish businesses and individuals from other customers afforded the benefits of its corporate accounts. *Id.* at 34a-36a, 41a, 44a-45a, 48a, 61a. "Yeshivas" were not allowed to open or maintain corporate accounts on the same terms or with the same advantages as other customers. *Id.* Both representative plaintiffs, Z.A.I. and Levi Sufrin, were subjected to the Yeshiva policy. *Id.* at 32a, 37a, 50a.

Petitioners moved for class certification in the District Court under subdivisions (b)(2) and (b)(3) of Rule 23. That Court had the benefit of a relatively extensive record developed principally through document and deposition discovery directed to certification issues. In support of their motion, Petitioners relied heavily on internal Avis documents, and testimony and sworn statements from former and current Avis employees assigned to the Avis Worldwide Reservations Center in Tulsa, Oklahoma, the central corporate location from which the Yeshiva policy emanated and was administered. *Id.* at 34a-36a, 41a, 44a-45a, 48a, 61a.

(Cont'd)

"Yeshiva, n. pl. 1. An Orthodox Jewish school for the religious and secular education of children of elementary school age. 2. An Orthodox Jewish school of higher instruction in Jewish learning, chiefly for students preparing to enter the rabbinate. [<Heb:academy,orig,sitting (i.e., a place to sit)]."

Those sources show that the Yeshiva policy was applied to Jews or to those who were thought to be Jewish because of their name, accent, or area in which they lived. *Id.* Customers identified as "Yeshivas" were denied corporate accounts, denied full benefits under the corporate accounts, or had use of their corporate accounts canceled. Sometimes they were falsely placated by being given meaningless "discount numbers." *Id.* at 36a.[2]

B. ***The District Court Decision***

The District Court, after extensive briefing and a full hearing, found that Petitioners had satisfied the requirements of Rule 23(a) and (b)(3).[3] *Id.* at 39a-51a; 57a-66a. Accordingly, the District Court certified a class consisting of:

> All Jewish individuals and Jewish-owned businesses who, subsequent to January 1, 1990, have attempted to contract, have contracted, or will in the future contract with Avis to open an account for use in their business, and who were refused an account, had their account canceled, or were given a less advantageous account because of their religion, ancestry, and/or ethnicity.

Israel, Pet. App. at 68a.

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2. Avis "admits that it has a 'Yeshiva' policy, but claims it has 'nothing to do with religious discrimination,' but is merely a means to alleviate the problem of all drivers under twenty-five years of age attempting to use corporate accounts to circumvent the minimum age requirement for renting Avis cars." *Israel*, Pet. App. at 36a. Tellingly, there is no record evidence of non-Jewish "Yeshivas."

3. The District Court denied Petitioners' motion for certification under Rule 23(b)(2), but stated that if the certification of a Rule 23(b)(3) class was reversed on appeal, the case "can be certified under Rule 23(b)(2)," if the Petitioners' claims for money damages were dropped. Pet. App. at 68a, n.13. Respondents also appealed that finding to the Eleventh Circuit, but the Eleventh Circuit did not address that finding and it is not an issue in this Petition.

The principal issue for the District Court was whether *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), in which the Eleventh Circuit decertified a class consisting of African American motel patrons refused rooms or given inferior rooms because of their race, applied to this case. Respondent Avis relied heavily in the District Court on *Motel 6*, as well as *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), in opposing certification.

The District Court recognized the fundamental difference between this case and *Motel 6*, in which the unlawful discrimination "involved numerous separate acts of wrongdoing" by Motel 6 managers. Pet. App. at 61a. Unlike the record in this case, in *Motel 6*, "there was no significant proof of a company-wide discriminatory policy," and thus the plaintiffs "could not 'bridge the gap' between individual claims and classwide issues and the case broke down into 'an unmanageable variety of legal and factual issues.' " *Id.* (citing *Falcon*, 457 U.S. at 159 n.15).

In *Falcon*, which the Eleventh Circuit relied on in *Motel 6*, the issue was whether a Mexican-American plaintiff complaining of discriminatory promotion practices could properly maintain a class action on behalf of Mexican-Americans who were not hired by the defendant. 457 U.S. at 149. This Court held that the plaintiff could not because there was nothing in the record to support a claim that the defendant had a company-wide policy or practice:

> [C]onceptually, there is a wide gap between (a) an individual's claim that he has been discriminated against on the basis of race, and his otherwise unsupported allegation that the defendant has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claims will share common

> questions of law or fact and that the individual's claims will be typical of the class claims.

Falcon, 457 U.S. at 157.

This Court also said that "significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees," if the discrimination in both hiring and promotion was practiced in the "same general fashion." *Id.* at 159 n.15. The Court gave as an example "a biased testing procedure" used to evaluate both job applicants and promotion candidates as something that would "clearly satisfy the commonality and typicality requirements of Rule 23(a)." *Id.*

The District Court correctly recognized that this case satisfied the *Falcon* standard and thus was very different from *Motel 6*:

> [T]he case against Avis is not dependent on anecdotal evidence of individual class members. It is undisputed that Avis employed a "Yeshiva" policy and that the "Yeshiva" policy emanated from its World Reservations Center. The allegations of discrimination here are based on a documented company policy written by upper management at Avis's World Reservations Center, distributed to its employees by upper management at Avis's World Reservations Center, and monitored by upper management at Avis's World Reservations Center. The proof offered is reliable for certification purposes.
>
> * * *
>
> To paraphrase [Motel 6], most if not all of plaintiffs' claims will stand or fall on the question whether Avis has adopted and applied such a

> centralized policy and practice of ethnic and religious discrimination, and not on the resolution of the highly case-specific factual issues alluded to by Avis in its briefs and oral argument before the court. This critical common element satisfies the standard set forth in [Motel 6].

Pet. App. at 61a-62a (citations and footnotes omitted).

C. *The Record Below Amply Supported The District Court's Ruling*

The District Court had a substantial evidentiary basis to conclude that "the named plaintiffs have significant evidence which, if true, shows that Avis operated under a general policy of discrimination against Jewish individuals and businesses seeking to obtain and retain corporate accounts." Pet. App. at 48a. Indeed, the record contains compelling evidence of a corporate policy and practice of unlawful discrimination that, under *Teamsters*, is more than sufficient to establish a *prima facie* case of unlawful classwide discrimination in violation of Section 1981. From this, the District Court soundly concluded, questions common to the class about whether the Yeshiva policy was one of intentional discrimination not only predominate over individual questions but also, under *Teamsters*, should be resolved before individual questions are reached.

1. *Internal Avis Documents Openly Discuss The Yeshiva Policy*

Internal Avis documents obtained in discovery include:

• A memorandum dated August 14, 1994, from Wade Cook, the Telesales Manager, reminding the Worldwide Reservations Center sales representatives:

> So that everyone is RAPPING to the same RAP song, please follow the attached policy when in

> question as to sell an account that you believe is a Yeshiva request.

(Plaintiffs' Renewed Motion for Class Certification filed July 7, 1998 "Renewed Motion", Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. B.)[4]

The memorandum instructed the sales representatives that when faced with a possible Yeshiva account: "Every effort should be taken not to sell to the account." (*Id.*) The memorandum went on to list four specific "criteria" to use to discourage a "Yeshiva" customer "[i]f you can't find justification as to why not to sell the account." (*Id.*) These "procedures," including requirements that the customer's business be listed with Dun & Bradstreet and that the customer "sign an agreement of liability," were *not* suggestions; Avis sales representatives were cautioned that: "Your adherence to this policy is mandatory and appreciated." (*Id.*)

• An April 1, 1994 memorandum from Michael Fitch, the director of Telesales, refers to the assignment of a special identification number to the "Yeshiva Bunch." (R VIII-182, 183, 184, Renewed Motion, Ex. K-1.) According to Fitch:

> This is a dummy number we set up a few years ago to handle these bogus groups. The age required is 25 with no other privileges.

(*Id.*)[5]

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4. The "R" and "Supp.R." citations refer to the volume number of the original record below, docket number, and, when applicable, the exhibit or tab within the document and/or the page number.

5. This memorandum, which contained Fitch's handwritten note at the top "write cancellation letters for most of these accounts," listed a total of thirteen accounts, twelve of which, including the "Yeshiva Bunch," had the word "Yeshiva" in their name. (*Id.*)

• Another memorandum to sales representatives, dated July 11, 1994, from Fred Kruse, an Avis Telesales group leader, began:

> OUR FRIENDS, THE YESHIVA'S ARE BEGINNING TO CALL AGAIN MORE FREQUENTLY (PLEASE TAKE NO OFFENSE IF ANY OF YOU ARE OF THE JEWISH FAITH).[6]

• An even earlier memorandum from "Mildred,"[7] dated December 20, 1990, shows the following instructions for "Corporate Accounts" with regard to "Yeshivas": "*DO NOT* mention Corporate Awards!!! because they will not be eligible for this program." This memorandum also tellingly shows Avis' concern that the Yeshiva policy be kept quiet, cautioning the sales representatives: "*DO NOT* send anything through the system."[8]

Petitioners also obtained records showing Avis' actual application of the Yeshiva policy. These documents identify approximately 40 persons, including Petitioners, whose Avis accounts were denied or terminated, and whose files are marked with comments such as "DO NOT RENT PER . . . SECURITY . . . UNDERAGE YESHIVA."[9]

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6. (Supp. R. VIII-182, 183, 184, Renewed Motion, Ex. A.) This memorandum went on to instruct the sales representatives that the same "bogus" account number, "AWD#B341500," referred to by Fitch for "this group," which would not entitle the caller to "corporate awards" or a waiver of the 25 year old minimum age requirement, was to be used if the Jewish caller was "insistent" on setting up an account. (*Id.*)

7. Referring to Mildred Gaugau, a lead agent and "assistant supervisor" in the Telesales department in 1990. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. K at 58-59.)

8. (Supp. R. VIII-182, 183, 184, Renewed Motion, Ex. S.)

9. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. R.)

These files contain names that, most would agree, appear to be Jewish, singled out and identified as not entitled to privileges granted other customers *because* of that fact. These are the people, from all across the country, on the "DO NOT RENT" list, as Avis "Yeshivas":

Zev Deutsch (NY)
Moshe Sofer (NY)
Yeruchen Blesofsky (NY)
Mivtzoim (PA)
Yeshiva Beth Moshe (references to Judah A. Goldberg, Joseph Mandelbaum, among others)
Yeshiva Toras Chaim (CO)
Alexander Hoffman (NY)
Eliyohu Kessler (PA)
Daniel Bader (OH)
Menachem Gordon (OH)
Shlomo Kreithan (NY)
Yecheskel Schwab (PA)
Avrohom Weinrib (PA)
Bezalel Wagner (NY)
Nachman Ullman (CA)
Israel Neiman (NY)
Yosef Jacobovitch (OH)
David Notis (OH)
Avrohom Newhouse (PA)
Aaron Wasserman (CO)
Moteh Berger (OH)
Shraga Herskowitz (NY)
Avi Cadoch (FL)
Isaac Lichtenstein (NY)
Tovi Goldstein (NY)
Avrohom Blesofsky (NJ)
A. Goldstein (MI)
Simaya Krinsky (NY)
Mahor Perets (NY)
Eliyohu Rosenfeld (PA)
Yacov Simmonds (NJ)
Shneur Teitelbaum (NJ)
Levi Cohen (NY)
Nathan Friedman (NY)
Joshua Borenstein (MN)
Levi Zyslih (NY)
Dovid Ham (FL)
Levi Sufrin (FL)
Moshe Oestrich (NY)

2. *Avis Employees Testified About The Application of the Yeshiva Policy*

Testimony and sworn statements by former and current Avis employees further described how the Yeshiva policy was instituted and administered. William B. Ward, a former Avis employee of the Corporate Telesales Department, testified that "everybody" at the Telesales Department

followed the Yeshiva policy.[10] If accounts for "Yeshivas" actually were set up, Wade testified, Telesales manager Wade Cook could "make your life hell" and employees could be fired.[11] Ward also gave a sworn declaration about how he was trained and instructed by his supervisors at the Telesales Department not to set up accounts for "Yeshivas." Ward declared that Avis denied corporate accounts to hundreds of businesses identified as Yeshivas, and that when Yeshivas ultimately did receive accounts, they were "T-number" or "B-number" accounts, which did not receive the benefits of a true corporate account. This practice "gave the client the illusion that [he] had opened a corporate account."[12]

Elaine Rodgers, another former Avis employee, testified by both deposition and sworn statement that, "if a person lived in a certain area of New York or they talked a certain way or had a certain accent, I should say, they were investigated a whole lot more that what someone from, say Kansas would be investigated when it came to getting a corporate account or reducing the minimum age for corporate accounts."[13]

Current Avis employees also testified regarding the Yeshiva policy, including:

• Stephen Culley, a manager in the Telesales Department, admitted that a separate account number was set up for Yeshivas as a group, confirming Ward's account of the use of special secret designations to deny "Yeshivas" the benefits of a corporate account.[14]

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10. Ward's testimony was given in a deposition in *Pugh v. Avis Rent-A-Car System, Inc.*, U.S. District Court for the Eastern District of North Carolina, Southern Division, Case Number 7-96-CV-91-F(2).

11. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. C.)

12. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. D at 26.)

13. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. F at 89.)

14. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. I at 21.)

• Michael Fitch, director of Telesales since 1987, testified that the first time he ever heard the term "Yeshiva" was in 1989 or 1990 at Avis.[15] He also testified that the word "Yeshiva" had a negative connotation in his department and that Yeshiva accounts did not receive free rental days.[16]

• Wade Cook, an Avis Telesales manager, also admitted that Yeshiva accounts were given "T-numbers" and received less favorable rate codes than corporate accounts.[17]

D. *The Eleventh Circuit Decision*

The Eleventh Circuit panel did not disturb, or even question the District Court's findings that Petitioners' evidence of a company-wide policy and practice of unlawful discrimination was sufficient to "bridge the gap" between Petitioners' individual experiences and the existence of an unlawful Avis policy that impacted a class of similar persons in the same manner. Pet. App. at 48a.[18] Nevertheless, the Eleventh Circuit panel, relying on unsupportable distinctions between employment and nonemployment discrimination, and between legal and equitable remedies, held that "the plaintiffs have failed to meet the predomination

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15. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. K at 16.)

16. (*Id.* at 44, 57-58.)

17. (Supp.R. VIII-182, 183, 184, Renewed Motion, Ex. M at 32-33.)

18. Virtually the only discussion of record evidence of the Avis Yeshiva policy by the Eleventh Circuit panel was in the context of its questioning whether a court would be able to identify class members, since the panel professed it was "not even certain what a 'Jewish sounding name' or a 'Jewish accent' is." *Id.* at 29a. The District Court expressed no similar concern, nor are Petitioners aware of any other court being stymied by having to identify class members by ethnic characteristics, whether skin color, name, or language. Avis obviously did not share the panel's difficulty in identifying individuals with Jewish names, such as "Herskowitz," "Goldstein," "Borenstein," and "Jacobovitch," all on its "Do Not Rent . . . Yeshiva" list.

requirement of Rule 23(b)(3)." That holding, as shown below, is in direct conflict with this Court's decision in both *Teamsters* and *McDonnell Douglas*, and also has created a split of authority among the Circuit Courts of Appeals over the application of these decisions in Section 1981 nonemployment discrimination cases.

In reaching its conclusion on predominance, the Eleventh Circuit panel also erroneously held that the principle at the heart of the *Teamsters* decision — that proof of a pattern-or-practice of discriminatory decision making in a class context creates a rebuttable presumption that particular decisions made when that discriminatory policy was in force were made in pursuit of that unlawful policy — was inapplicable in this case. In applying its holding, the panel improperly limited *Teamsters* to employment discrimination class actions seeking equitable relief.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES ISSUES OF GREAT NATIONAL IMPORTANCE WORTHY OF CERTIORARI BECAUSE (1) IT CREATES A SPLIT AMONG THE CIRCUIT COURTS ABOUT PRESUMPTIONS AND BURDENS OF PROOF IN SECTION 1981 CLAIMS AND (2) IT ERRONEOUSLY RESTRICTS THE USE OF CLASS ACTIONS TO REMEDY UNLAWFUL DISCRIMINATION IN DIRECT CONTRAVENTION OF THE OBJECTIVES OF SECTION 1981

There are two important reasons this Court should review the Eleventh Circuit panel's singular misinterpretation and misapplication of this Court's established precedents on allocating burdens of proof and creating presumptions of intent in both individual and class cases under Section 1981.

First, the decision below creates a split of authority between the Eleventh Circuit and six other Circuits over

whether *McDonnell Douglas* applies to nonemployment-related, as well as employment-related, discrimination cases. The Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits all have applied *McDonnell Douglas* to nonemployment-related discrimination cases. The Eleventh Circuit panel, however, interpreted *McDonnell Douglas* in a very different way. In order to avoid applying *Teamsters* to this case, the Eleventh Circuit panel interpreted both *McDonnell Douglas* and *Teamsters* as narrowly applicable to employment discrimination cases. *See* Point II, below.

Second, the Eleventh Circuit panel's decision cannot be reconciled with this Court's holdings in *McDonnell Douglas* or in *Teamsters*. The decision below erroneously imposes an unwarranted limitations on the use of Rule 23 to remedy unlawful nonemployment-related racial, religious, and ethnic discrimination. *See* Point III, below.

It is critical that this Court grant review to ensure the uniform interpretation and application of important aspects of the federal civil rights laws. Similarly, it is critical that the Court ensure that the procedural mechanisms available for the private enforcement of the civil rights laws — for example, the class action — are not erroneously limited.

Private enforcement of the civil rights laws through the class action vehicle has been a major force for over fifty years in ridding our Nation of the shameful burden of racial, ethnic, and religious discrimination, not only in employment, but in virtually every aspect of our society, including public accommodations,[19] education,[20] and even racial discrimination in prisons.[21] The Eleventh Circuit panel's decision limiting *Teamsters* to employment

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19. *Daniel v. Paul*, 395 U.S. 298 (1969).

20. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

21. *Lee v. Washington*, 390 U.S. 333 (1968).

discrimination cases is not only profoundly in error, it also represents a significant erosion in the ability to use Rule 23 to remedy classwide racial and ethnic discrimination. Court of Appeals decisions, like the one below, that limit, and thus weaken this Court's decisions on the classwide application of federal antidiscrimination statutes, warrant the grant of certiorari and a thorough review by this Court.

II. THE DECISION BELOW HAS CREATED A SPLIT IN THE CIRCUITS

This Court definitively held in *Teamsters* that, in class cases alleging unlawful discrimination, the question whether a defendant maintained an intentional policy and practice of discrimination was an overriding common question and, if answered affirmatively, established a *prima facie* case of unlawful discrimination applicable to every class member. The Court held: (1) a *prima facie* case of discrimination was established by evidence that it was the defendant's "standard operating procedure," *Teamsters*, 431 U.S. at 336; and (2) proof of a pattern or practice of discrimination "supports an inference" that employment decisions about individual class members were made "in pursuit of that [discriminatory] policy," *Teamsters*, 431 U.S. at 362. As to obtaining individual relief:

> The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Teamsters, 431 U.S. at 362 (footnote omitted).[22]

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22. Although *Teamsters* was brought by the Government, its holding also applies to private class actions. *See Franks*, 424 U.S.

(Cont'd)

The *Teamsters* presumption of intentional discrimination in class cases follows directly from *McDonnell Douglas*, in which "the Court considered 'the order and allocation of proof' in a private non-class action challenging employment discrimination." *Teamsters*, 431 U.S. at 357 (quoting *McDonnell Douglas*, 411 U.S. at 800). Under *McDonnell Douglas*, an individual plaintiff can establish a *prima facie* case of employment discrimination by showing that the plaintiff: (1) was a qualified applicant; (2) was a member of a racial minority group; (3) applied unsuccessfully for a job; and (4) after rejecting the plaintiff, the employer continued to seek applicants with similar qualifications. *See Teamsters*, 431 U.S. at 357-58; *McDonnell Douglas*, 411 U.S. at 802.

Both *McDonnell* and *Teamsters* provide means to create a reasonable inference of intentional discrimination based on race, ethnicity, or religion — the defining element of any discrimination claim. In both cases, this Court recognized the importance of inferences in discrimination cases because there rarely will be direct proof of discrimination. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) (presumptions are necessary for the plaintiff to "have his day in Court, despite the unavailability of direct evidence" of intentional discrimination). The procedural means available to create an inference of intent in each case reflect the context and scope of the discrimination alleged — individual or class; the utility and applicability of those means do not depend in any way, however, on whether the unlawful discrimination is in the employment or in some other context.

(Cont'd)

at 772 (demonstration by a plaintiff class of the existence of a pattern or practice of discrimination establishes a presumption that individual class members were discriminated against based on race); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875-76 & n.9 (1984). *See also* Pet. App. at 20a. (panel acknowledges "[i]t is clear that *Teamsters* applies in private class actions" alleging disparate treatment in employment under both § 1981 and Title VII).

This Court, in *Teamsters*, explained that in the context of an individual action, *McDonnell Douglas* recognizes the reasonableness of drawing an inference of discrimination, "without any direct proof" by a showing that the "most common legitimate reasons to reject a job applicant — lack of qualifications or the absence of a job opening" were not present. *Teamsters*, 431 U.S. at 358 n.44. Based on that inference, *McDonnell Douglas* entitles the individual plaintiff to a rebuttable presumption that the defendant's hiring decision was based on unlawful discriminatory criteria.

The availability of a "pattern or practice" presumption in a class case is simply "another means" to create the same reasonable inference of "unlawful discrimination" to satisfy the plaintiff's initial burden to establish a *prima facie* case. *Teamsters*, 431 U.S. at 359. In *Teamsters*, this Court explained the basis of its holding that proof of a policy or practice of discrimination in a class case creates a presumption that it is unlawful:

> Although the prima facie case [does] not conclusively demonstrate that all of the employer's decisions [are] part of the proved discriminatory pattern and practice, it [does] create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice change[s] the position of the employer to that of a proved wrongdoer. Finally, the employer [is] in the best position to show why any individual employee was denied an employment opportunity.

Teamsters, 431 U.S. at 359 n.45 (citations omitted).

Under both *McDonnell Douglas* and *Teamsters*, the point is to identify what is required of the alleged victim in a given context to establish a defendant's intent to discriminate — the starting point for both individual and class discrimination claims. *See Teamsters*, 431 U.S. at 335 n.15 ("[p]roof of

discriminatory motive is critical" in disparate treatment discrimination cases).

Recognizing that the defining element of any disparate treatment case is *not* the particular type of discrimination being challenged, but the defendant's intent to discriminate on the basis of unlawful criteria, six Circuit Courts of Appeals have correctly applied *McDonnell Douglas* to individual nonemployment Section 1981 claims. *See Chauhan v. M. Alfieri Co.*, 897 F.2d 123 (3d Cir. 1990) (commercial lease); *Jackson v. Montgomery*, 1993 U.S. App. LEXIS 16244 (10th Cir. July 1, 1993) (golf cart rentals); *Selden Apartments v. United States Dept. of Housing & Urban Development*, 785 F.2d 152, 160-61 (6th Cir. 1986) (housing); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980) (housing); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979) (housing); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) (housing).

In *Chauhan*, for example, the Third Circuit recognized that the well-known "burden shifting provisions" in *McDonnell Douglas* resulted from "the evidentiary difficulties involved in proving discriminatory intent in Section 1981 cases." 897 F.2d at 126. The Tenth Circuit similarly held that the *McDonnell Douglas* "scheme of proof" was properly applied by the trial court to determine "whether there was intentional discrimination" against African-Americans that prevented them from renting golf carts "under the same terms as white golfers." *Jackson*, 1993 U.S. App. LEXIS 16244, at *7.

All of these decisions applied *McDonnell Douglas* to nonemployment-related Section 1981 claims to determine whether the plaintiff had established a *prima facie* case of intentional discrimination. Six Circuit Courts were consistent in their interpretation: *McDonnell Douglas* was about reasonable inferences leading to a presumption of intentional unlawful discrimination. Not one of these Courts conceived

of *McDonnell Douglas* as being limited to, or dependent on, the particular factors present in cases of employment, as opposed to other types, of discrimination.

The Eleventh Circuit panel erroneously held that the *Teamsters* pattern-or-policy presumption did not apply to this case based on what it called a comparison of the showing that must be made under *McDonnell Douglas* to establish a presumption of discrimination in an individual case, with the pattern or practice showing under *Teamsters* that will establish the presumption for each class member in a class case. In comparing the respective showings, the panel focused narrowly on the particular factors related to employment-related decisions to the exclusion of the broader principles and factors applicable to any illicit discriminatory decision-making process.

For example, the Eleventh Circuit panel erroneously concluded that even when class plaintiffs can prove a pervasive policy and practice of discrimination the only effect is to relieve class members from having to show "that they were qualified for *the job at issue* in subsequent individual proceedings." Pet. App. at 25a (emphasis added). Throughout its decision, the panel consistently focused on the particular factors that inevitably arise in employment cases, which were necessarily discussed in both *Teamsters* and *McDonnell Douglas*. That focus was in error, is at odds with the approach employed by six other Courts of Appeals, and justifies review by this Court.

As this Court explained, in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), applying *McDonnell Douglas* in a Section 1981 case arising from discriminatory promotion practices:

> We have developed . . . a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue whether

> the defendant intentionally discriminated against the plaintiff.

491 U.S. at 186-87 (citing *McDonnell Douglas* and its progeny). The panel's preoccupation with the specific employment-related factors discussed in *McDonnell Douglas* bears little relation to this Court's description of its "carefully designed framework" for the evaluation of evidence to determine "whether the defendant intentionally discriminated against the plaintiff." *Patterson*, 491 U.S. 186-87.[23]

Pointedly, in *Teamsters*, this Court emphatically rejected the narrow, limited approach the Eleventh Circuit panel took in this case:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

431 U.S. at 358.

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23. This Court took pains to explain, in *McDonnell Douglas*, that it was not establishing a rigid set of elements appropriate to every fact situation. *See* 411 U.S. at 802 n.13 (because facts will "necessarily . . . vary" in Title VII cases, the "specification . . . of prima facie proof [set forth in the decision] . . . is not necessarily applicable in every respect to differing factual situations"). *See also Teamsters*, 431 U.S. at 358 (rejecting defendants' effort to "seize upon the *McDonnell Douglas* pattern as the only means of establishing a *prima facie* case of individual discrimination").

III. THE PANEL'S DECISION IS IN IRRECONCILABLE CONFLICT WITH THE *TEAMSTERS* DECISION

The decision below also directly conflicts with *Teamsters*. If allowed to stand, it will have a chilling effect on plaintiffs' ability to secure effective remedies effectively for violation of their rights under Section 1981, even when they can show a *prima facie* case of classwide discrimination — such as Avis' documented company-wide "Yeshiva" policy. Since this raises fundamental questions as to the reach and application of a basic federal statute it warrants review by this Court.

A. The Eleventh Circuit Panel's Decision Is Based On A Fundamentally Mistaken Distinction Between Employment and Nonemployment Discrimination Claims

The Eleventh Circuit panel's conclusion that *Teamsters* is limited to employment cases is based on a fundamental misapprehension of that case and its application to proof in Section 1981 discrimination class actions. Under *Teamsters*, the question of whether Avis engaged in intentional discrimination can and should be addressed on a classwide basis when evidence of a company-wide practice and pattern of intentional discrimination has been presented. *Teamsters*, 431 U.S. at 359 (proof of allegation that defendant had "a broad-based policy of employment discrimination" held sufficient to establish a *prima facie* case for the entire class) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976)). The Eleventh Circuit panel's refusal to allow "a policy or practice of discrimination" to function as a "substitute" for the intent element of a *prima facie* Section 1981 claim in this class action, Pet. App. at 25a, cannot be reconciled with *Teamsters*. *See* 431 U.S. at 334-35 and n.15. It also disregards the established "crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984).

The panel's holding that the presumption of intent afforded a class under *Teamsters* is "appropriate in employment discrimination cases," Pet. App. at 22a, but not in nonemployment discrimination cases such as this case, is fundamentally erroneous. The policy-or-practice standard under *Teamsters* is about whether the defendant can fairly be presumed to have used unlawful criteria in deciding to deprive the class members of a contractual benefit. The critical element in *both* employment *and* nonemployment Section 1981 cases is whether the defendant intentionally discriminated. The particular benefit at issue — employment, housing, golf cart, or automobile rental — is incidental. As this Court said in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978):

> The *central focus of the inquiry* in a case such as this *is always* whether the employer is treating "some people less favorably than others *because of their race, color, religion, sex, or national origin*." *Teamsters v. United States, supra*, at 335 n.15.

408 U.S. at 577 (emphasis added).

The panel lost sight of this "central focus" — *i.e.*, the overriding class issue of whether Avis had an intentional policy-and-practice of unlawful discrimination. Instead, it viewed the *Teamsters* policy or practice presumption in class cases as a rule uniquely applicable to one particular type of classwide discrimination, *employment* discrimination, to the exclusion of its broader principle.

The panel's explanation of why the *Teamsters* presumption does not apply to a nonemployment class action is based on the palpably false speculation that there are fewer potential non-pretextual legitimate reasons to reject a job application than there are to reject an application for an Avis corporate account. The panel held:

> A finding that Avis has a policy or practice of discrimination could not possibly function as a

> meaningful substitute for the establishment of an actual intent to discriminate. . . . *because the legitimate reasons why Avis might have judged an individual plaintiff to be "unqualified" for a corporate account are far more various and individualized than in the employment context.*

Pet. App. at 25a-26a (emphasis added). In fact, the panel's reasoning for refusing to apply *Teamsters* in nonemployment class actions applies equally to employment discrimination class actions.

A defendant may well be able to assert as many "legitimate" reasons for judging an applicant unqualified for employment as there are for Avis to judge an applicant unqualified for a corporate account. In either context it is not difficult to conjure up an almost endless variety of possibly "legitimate" reasons that "may" arise in any given case. However, even the fact that real — as opposed to hypothetical — individual issues will remain after classwide issues are determined, is no obstacle to class certification. *See Teamsters*, 431 U.S. at 343 n.24 ("individual proof concerning each class member's specific injury was appropriately left to [subsequent] proceedings to determine individual relief"). Since a *prima facie* case for every class member is established by proof of Avis' company-wide Yeshiva policy, *Teamsters*, 431 U.S. at 359, the panel's recitation of "individual issues" that it claims "must be addressed. . . . in order for each plaintiff to demonstrate a *prima facie* case of intentional discrimination," Pet. App. at 17a, is irrelevant.

B. The Panel's Distinction of *Teamsters* Based On the Nature Of The Relief Sought Is Also Erroneous

The Eleventh Circuit panel also attempts to distinguish *Teamsters* on the ground that the relief to which those plaintiffs were entitled — including back pay — was "equitable" as opposed to the "legal" compensatory and

punitive damages Petitioners seek. This portion of the panel's decision, which is based on erroneous assumptions as well as factual mistakes, cannot be justified under *Teamsters* and, if allowed to stand, will undermine some of the core objectives of Section 1981.

First, the panel held that because Petitioners sought only legal remedies, individual class members in this case — but presumably *not* those in *Teamsters* — would "have to prove that they actually suffered some injury" from the unlawful discrimination to be entitled to any individual relief. Pet. App. at 27a. The panel's reasoning is faulty and the distinction is untenable.

The *Teamsters* plaintiffs, of course, also had to show that the alleged discrimination caused them an "actual injury" before being entitled to individual awards. *See Teamsters*, at 361-62 ("[w]hen the Government seeks individual relief for the victims of the discriminatory practice," the district court must conduct additional proceedings to show that "each individual was discriminatorily denied" employment opportunities); *see also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 567-68 (1984) (individual class members who seek competitive seniority must prove they have been actual victims of a discriminatory practice).

Second, the panel simply ignores the fact that Petitioners' "complaint seeks declaratory and injunctive relief as well as damages pursuant to 42 U.S.C. § 1981." *Israel*, Pet. App. at 37a.

If allowed to stand, the Eleventh Circuit decision would prevent the class action from being used in any Section 1981 action seeking legal monetary relief, but allow its use when equitable remedies are being sought, including equitable monetary relief. *See Rutstein*, Pet. App. at 26a-27a (distinguishing *Teamsters* on the ground that the relief sought in that case was the payment of money for back pay [an equitable remedy], and in this case Petitioners seek the

payment of money for compensatory damages [a legal remedy]). The question of whether that distinction is a proper application of Section 1981 and Rule 23 certainly is worthy of this Court's attention.

Third, if, as contemplated by the District Court, proceedings following determinations of class issues were needed to address discrete individual issues, such as the award of compensatory damages, there is no basis in the record to believe those proceedings would not be manageable.[24] To the contrary, class treatment would be more, rather than less, efficient in this case.

Petitioners intend to not only prove a pattern and practice of unlawful discrimination on a class basis, but also to present classwide proof of the monetary value of the benefits of Avis corporate accounts through expert analysis of, and testimony about Avis' own data obtained through discovery — most concretely the amount of rental discounts available to persons not in the class. Those findings, as well as other details available directly from Avis' own records about who was designated a "Yeshiva," when they were designated, and under what terms they were permitted (if at all) to rent from Avis, will significantly streamline any subsequent individual damage proceedings.[25]

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24. Pet. App. at 67a, n.12 (court will bifurate proceedings, first determining class issues and "only if a policy and practice of discrimination is found will the court determine discrete liability issues").

25. Similarly, the Eleventh Circuit's concern with calculating individual damages arising from "mental and emotional distress," 211 F.3d at 1239-40, is also contrary to the record. As Petitioners pointed out to the panel in their briefs, they do not seek intangible damages as shown by their complaints seeking "actual damages," and alleging that Avis' Yeshiva policy caused them and the class to be deprived of "financial benefits available to non-Jewish customers." Z.A.I. Class Action Complaint at pp. 9-10 (Supp. R. V-154 at 9-10); Sufrin Class Action Complaint at pp. 9-10 (Supp. R. X-1 at 9-10).

Fourth, and finally, the Eleventh Circuit glosses over the demand for punitive damages, which unlike compensatory damages, can easily be determined and awarded on a classwide basis. Because of the punitive and deterrent purposes of punitive damages, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981), many courts have recognized them as "fundamentally collective." *E.g.*, *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1333 (5th Cir. 1995); *see also Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996); *Knauer v. Ohio State Life Ins. Co.*, 102 F. Supp. 2d 443, 449 (N.D. Ohio 2000); *Alvarado v. Carnation Co.*, 1995 U.S. Dist. LEXIS 10084, at *20 (D. Idaho 1995) (certifying a Rule 23(b)(3) class on issue of pattern and practice in a Section 1981 discrimination claim; "the class as a whole will be entitled to injunctive relief granted by the court, and the issue of punitive damages is also common to the class").

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, DECIDED AND FILED MAY 11, 2000

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10782.

DAVID RUTSTEIN,

Plaintiff,

ZEIREI AGUDATH ISRAEL BOOKSTORE,
LEVI SUFRIN,

Plaintiffs-Appellees,

v.

AVIS RENT-A-CAR SYSTEMS, INC., a Delaware Corporation, authorized to do business in the State of Florida,

Defendant-Appellant.

* * *

May 11, 2000, Decided
May 11, 2000, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Florida. (No. 97-00807-1-CV-ASG). Alan Stephen Gold, Judge.

* * *

Appendix A

JUDGES: Before TJOFLAT, Circuit Judge, and RONEY and FAY, Senior Circuit Judges.

OPINION BY: TJOFLAT

OPINION: TJOFLAT, Circuit Judge:

Jewish plaintiffs[1] brought this civil rights lawsuit in the United States District Court for the Southern District of Florida on behalf of themselves, and all others similarly situated, against Avis Rent-A-Car System, Inc. ("Avis"). Plaintiffs alleged that Avis had denied them their right to make and enforce contracts because of their race, ancestry, and ethnic characteristics,[2] in violation of 42 U.S.C. § 1981 (1994).[3]

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1. One of the named plaintiffs in this action is the Zeirei Agudath Israel Bookstore. For ease of discussion, we refer to all plaintiffs as persons (and, therefore, as "he or she" instead of "it").

2. We refer to plaintiffs' allegations as a complaint for discrimination on the basis of plaintiffs' ethnicity.

3. As amended, 42 U.S.C. § 1981 provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(Cont'd)

Appendix A

They sought compensatory damages, punitive damages, and injunctive relief. The district court certified the case as a class action under Federal Rule of Civil Procedure 23(b)(3).[4]

(Cont'd)

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

4. Federal Rule of Civil Procedure 23(a) and (b) provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(Cont'd)

Appendix A

(Cont'd)

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods

(Cont'd)

Appendix A

Pursuant to Rule 23(f),[5] we permitted Avis to appeal the district court's class certification decision. We now reverse.

I.

The procedural history of this case is somewhat complicated by the fact that the original plaintiff, David Rutstein, was apparently not all that he claimed to be. On May 6, 1997, Rutstein filed a complaint alleging that Avis, a corporation engaged in the business of renting cars, had "adopted as an official corporate policy a practice to

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(Cont'd)

> for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

5. Federal Rule of Civil Procedure 23(f) provides:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

discriminate against Jewish customers as a class of people and had instructed its employees to decline to open a corporate account for a business owned and/or operated by this class of people."[6] Rutstein claimed that at Avis' World Reservations Center in Tulsa, Oklahoma (the "Reservation Center"), employees had been instructed not to open corporate accounts for "Yeshivas." A Yeshiva was understood to be someone with a "Jewish sounding name" or "Jewish accent."[7] When a telesales representative at the Reservations Center identified a caller requesting to open a corporate account as a Yeshiva, the caller was either denied the account entirely, or was issued a "bogus" account that was not accorded the same benefits as those associated with a legitimate corporate account.

Rutstein claimed that he had applied for, but was denied, a corporate account because he is Jewish. Specifically, Rutstein alleged that

> commencing January 1993, he resided in North Miami Beach, Florida and operated Rutstein Insurance Agency. Upon application to Avis to open a corporate account and advising the account representative that he formerly lived in Crown Heights, New York and that the purpose of the

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6. A corporate account is a vehicle rental account offered by Avis that provides account holders with discount car rentals, bonus plans, and other financial incentives.

7. Webster's Third defines a "Yeshiva" as "a school for advanced Talmudic study." Webster's Third New International Dictionary 2651 (1993).

> opening of the account was to permit . . . Rutstein to visit his rabbi in New York and to conduct ongoing business in New York, he was advised that he would not qualify for the opening of a corporate account.

Three months later, Rutstein moved the court to certify a class, under Federal Rule 23(b)(2) and Rule 23(b)(3), of "all Jewish individuals and Jewish-owned businesses who have attempted to contract, have contracted, or will in the future contract with Avis to open a corporate rental account and who were or will be subjected to the policies and practices known as the 'Yeshiva policy'." Immediately after Rutstein filed his class certification motion, however, events occurred which made it apparent that he might not be an adequate class representative. Rutstein failed to appear at a court-ordered deposition scheduled for October 28, 1997, prompting Avis to move the court to dismiss the action, hold Rutstein in contempt, and direct him to pay expenses, including attorneys' fees, incurred by Avis as a result of his failure to appear.[8] Further, Avis moved the court for summary judgment, contending that

> evidence independently obtained by Avis demonstrates that plaintiff does not have a valid claim against Avis. Among other things, plaintiff never owned and operated a "Rutstein Insurance

8. Rutstein's counsel claimed that Rutstein failed to appear because he was "not feeling well." On December 3, 1997, the district court issued an order requiring Rutstein to pay all costs incurred by Avis as a result of his failure to appear at the deposition, and to schedule a time, within 10 days, at which he could be deposed.

> Agency" which he claims had existed since January 1993 and which he claims was wrongfully denied a corporate account by Avis. The evidence reveals that it was not until November 1993 that plaintiff even obtained an insurance license for himself as an individual and received his first appointment as an insurance agent by an insurer. No Rutstein Insurance Agency has ever been registered with the Florida Department of Insurance. Plaintiff's current business, known as Senior Allican, Inc., was not incorporated until August 1997, five months after this lawsuit was filed.

At a hearing before the district court on January 30, 1998, Rutstein's counsel admitted that Rustein was not an appropriate representative of the class. Counsel claimed that Rutstein had become "intimidated" by Avis's aggressive defense strategies, and that Rutstein had decided that he did not want to represent a class of "thousands" after all. Counsel assured the court that there was no cause for concern, however, and that the action could live on. On December 5, 1997, counsel had filed a motion on behalf of the Zeirei Agudath Israel Bookstore ("ZAI"), located in Chicago, Illinois, to intervene in the case as a plaintiff and proposed class representative under Federal Rule of Civil Procedure 24(b).[9] ZAI alleged that it was "a Jewish business which was subject to the precise discriminatory business practices

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9. Federal Rule of Civil Procedure 24(b) provides that "upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common."

which lie at the heart of Rutstein's complaint. ZAI applied for and received Avis account status, but once Avis discovered that ZAI was what Avis considered a 'Yeshiva', it terminated ZAI's account. . . ."[10] On February 23, 1998,

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10. In an amended complaint filed on February 23, 1998, ZAI detailed the circumstances of the alleged discrimination:

> In early 1995, ZAI, through its employee Joshua Borenstein, applied to Avis for an account, so that the bookstore's employees might get discounts when they rented automobiles. The bookstore uses rental cars frequently for trips to New York and other cities to pick up specially ordered books. ZAI's application, made in its full name of Zeirei Agudath Israel, was turned down. ZAI is an ongoing business and should have qualified to receive an Avis account, but upon information and belief, ZAI was denied the account because of its obviously Jewish sounding name.
>
> About a year later, ZAI applied again. The store was at a new address, and this application was made in the name of Z.A.I. bookstore, which is the name it is commonly known by, rather than Zeirei Agudath Israel bookstore, the name it used the first time it applied to Avis for an account. This time, the account was approved. Upon information and belief, ZAI was approved the second time it applied to Avis for an account, because the account representatives at Avis did not recognize ZAI as a Jewish sounding name.
>
> Before ZAI started renting vehicles from Avis, however, Mr. Borenstein requested an application for credit. He was sent the application, filled it out, sent it back and waited.

(Cont'd)

Appendix A

ZAI sought class certification under Rules 23(b)(2) and (3), seeking to represent a class of

> all Jewish individuals and Jewish-owned businesses who, subsequent to January 1, 1990, have attempted to contract, have contracted, or will in the future contract with Avis to open an account for use in their business, and who were refused an account, had their account canceled, or were given a less advantageous account because of their religion, ancestry, and/or ethnicity.

On March 27, 1998, the district court granted ZAI's Rule 24(b) motion to intervene, reasoning that because Rutstein was plainly inadequate as a class representative, intervention by ZAI would "strengthen the adequacy of class representation." The court also denied Avis' motion for summary judgment against Rutstein, denied Rutstein's request to act as class representative, and concluded that Rutstein could remain in the case as a nonrepresentative class member. A month later, the court also granted Levi Suffrin's

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> Eventually ZAI received a perplexing letter from Avis, informing it that because of excessive use by drivers under the age of 25, the account was rescinded. No one had ever used the Avis account. Upon information and belief, Avis rescinded ZAI's account because through the credit application process, Avis discovered that the Z.A.I. bookstore stood for Zeirei Agudath Israel bookstore, which it concluded was a "Yeshiva".

motion to intervene as a plaintiff and proposed class representative under Rule 24(b). Suffrin had filed a complaint on February 23, 1998, alleging that his corporate account had been terminated by Avis, and that the explanation Avis proffered for the termination (that he had presented a false identification when trying to rent a vehicle) was pretextual.[11]

Finally, on February 8, 1999, the district court granted ZAI and Suffrin's motion for class certification under Federal Rule 23(b)(3). The court also denied class certification under Rule 23(b)(2). Avis sought an interlocutory appeal of the class certification decision under Rule 23(f) and we granted permission to appeal.

II.

The initial burden of proof to establish the propriety of class certification rests with the advocate of the class. Jones v. Diamond, 519 F.2d 1090, 1099 (5th Cir.1975).[12] Assuming that the district court correctly interpreted the applicable law, we review the court's grant of class certification for an abuse of discretion. Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1022 (11th Cir.1996).

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11. The district court initially consolidated Suffrin's case with Rutstein's before granting Suffrin's motion to intervene under Rule 24(b).

12. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Appendix A

III.

A.

"A class action may be maintained only when it satisfies all the requirements of Fed.R.Civ.P. 23(a) and at least one of the alternative requirements of Rule 23(b)." Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir.1997) (footnote omitted). In the instant case, the district court certified a class under Rule 23(b)(3), which provides that

> an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . .
>
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed.R.Civ.P. 23(b)(3). That common questions of law or fact predominate over individualized questions means that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." Kerr v. City of West Palm Beach, 875 F.2d 1546, 1558 (11th Cir.1989) (quoting Nichols v. Mobile Bd. of

Realtors, Inc., 675 F.2d 671, 676 (5th Cir. Unit B 1982)).[13] "The predominance inquiry focuses on 'the legal or factual questions that qualify each class member's case as a genuine controversy,' and is 'far more demanding' than Rule 23(a)'s commonality requirement." Jackson, 130 F.3d at 1005 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 2249-50, 138 L. Ed. 2d 689 (1997)).

In order to determine whether common questions predominate, "we are called upon to examine the cause of action asserted in the complaint on behalf of the putative class." McCarthy v. Kleindienst, 741 F.2d 1406, 1412 (D.C.Cir.1984). Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249 138 L. Ed. 2d 689 (1997) ("The predominance inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 2458, 57 L. Ed. 2d 351 (1978) ("Class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' ") (quoting Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 558, 83 S. Ct. 520, 522, 9 L. Ed. 2d 523 (1963)); id. at 469 n.12, 98 S. Ct. at 2458 n.12 (" 'The more complex determinations required in Rule 23(b)(3) class actions entail even greater

13. In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir.1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

entanglement with the merits.' ") (quoting 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3911, p. 485 n.45 (1976)); Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir.1996) ("Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues."); Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir.1973) (en banc) ("It is inescapable that in some cases there will be overlap between the demands of Rule 23(a) and (b) and the question of whether plaintiff can succeed on the merits.").

In Jackson, plaintiffs sought class certification for, inter alia, a class of African-American customers who alleged that Motel 6 discriminated against its customers on the basis of race by either denying African-Americans motel accommodations altogether, or providing them with substandard accommodations. The substantive law of the underlying cause of action in Jackson required each plaintiff to establish that "(1) a Motel 6 employee denied him a room (or rented him a substandard room) on the basis of his race and either (2) that that employee had the general authority to rent motel rooms or (3) that that employee was acting in accordance with a Motel 6 policy or practice of racial discrimination." Jackson, 130 F.3d at 1006 n.13 (emphasis omitted). Given this, we held that "the single common issue in the . . . case — whether Motel 6 has a practice or policy of discrimination — is not . . . predominant over all the other issues that will attend the Jackson plaintiffs' claims." Id. at 1006. We explained that

> the Jackson plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination. The issues that must be addressed include not only whether a particular plaintiff was denied a room or was rented a substandard room, but also whether there were any rooms vacant when that plaintiff inquired; whether the plaintiff had reservations; whether unclean rooms were rented to the plaintiff for reasons having nothing to do with the plaintiff's race; whether the plaintiff, at the time that he requested a room, exhibited any non-racial characteristics legitimately counseling against renting him a room; and so on. . . . These issues are clearly predominant over the only issue arguably common to the class — whether Motel 6 has a practice or policy of racial discrimination. Indeed, we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether Motel 6 has a practice or policy of racial discrimination, but on the resolution of these highly case-specific factual issues.

Id.

In light of our decision in Jackson, we cannot see how plaintiffs can maintain a class action under Rule 23(b)(3) in the instant case. In order to make out a prima facie case of non-employment discrimination sufficient to withstand a motion for judgement as a matter of law under section 1981, a plaintiff will have to establish that (1) he or she is a member

of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (in this case, the making and enforcing of a contract).[14] See Bellows v. Amoco Oil Co., 118 F.3d 268, 274 (5th Cir.1997); Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir.1996); Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1087 (2d Cir.1993). The critical element, obviously, is the second. Each plaintiff will have to bring forth evidence demonstrating that the defendant had an intent to treat him or her less favorably because of the plaintiff's Jewish ethnicity. See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150, 73 L. Ed. 2d 835 (1982) (holding that "§ 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination"); Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1350 (11th Cir.1983); Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1237 (5th Cir.1980) ("A showing of discriminatory purpose is required to prove a prima facie case of discrimination under 42 U.S.C. § 1981."). As in Jackson, plaintiffs in the instant case argue that the issue of

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14. This formulation differs, somewhat, from that articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). Under McDonnell Douglas, an individual complaining of disparate treatment in employment can establish a presumption that the individual was discriminated against on the basis of his or her race by showing that (i) he or she belongs to a racial minority; (ii) he or she applied and was qualified for a job for which the employer was seeking applicants; (iii) the applicant was rejected despite his or her qualifications; and (iv) after the rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications, or the position was filled by a member of an unprotected class.

whether Avis maintains a policy or practice of discrimination predominates over all the legal and factual questions affecting only individual members of the class. Given that each plaintiff must demonstrate that he or she suffered from intentional discrimination, however, "we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether Avis has a practice or policy of ethnic discrimination, but on the resolution of . . . highly case-specific factual issues." Jackson, 130 F.3d at 1006.

Whether Avis maintains a policy or practice of discrimination may be relevant in a given case, but it certainly cannot establish that the company intentionally discriminated against every member of the putative class. The individual issues that must be addressed include not only whether Avis actually denied a particular plaintiff a corporate account, gave the plaintiff a less advantageous account, or cancelled the plaintiff's account, but also whether the particular plaintiff was of the age required by Avis to qualify for a corporate account; whether the plaintiff met the financial criteria for a corporate account; whether the nature of the plaintiff's expected use of Avis vehicles would make the transaction cost-justified for Avis; whether the plaintiff would be renting cars from Avis in a criminally high-risk or low-risk geographical area; whether the Avis employee who allegedly denied the plaintiff a corporate account judged the caller-applicant to be lying about his or her qualifications based on information not related to the caller's ethnicity; and so on, and so on. All of these issues are clearly case-specific, and they will all have to be addressed in one way or another in order for each plaintiff to demonstrate a prima facie case of intentional discrimination.

"Serious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability vel non, turn upon highly individualized facts." McCarthy, 741 F.2d at 1415; see Andrews, 95 F.3d at 1024 (in action against telephone companies' provision of 900-number services in which plaintiffs claimed, inter alia, that companies were violating gambling laws, court held that "aspects of each 900-number program will have to be individually examined to determine whether a particular program actually involves gambling or runs afoul of state gaming laws"); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 420 (5th Cir.1998) ("The success of claims for intentional discrimination will turn ultimately on the special circumstances of each individual's case."). The importance of these individualized issues, relative to the one common issue of whether Avis maintains a policy or practice of discrimination, is amplified by the fact that even if plaintiffs can demonstrate that a general policy or practice of discrimination was applied in their cases, Avis can escape liability by showing that an individual plaintiff would have been denied or terminated even if no such policy or practice had existed.[15] See Mabra v. United Food & Commercial Workers Local Union No.1996, 176 F.3d 1357 (11th Cir.1999) (holding that the mixed-motive amendments to

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15. The nature of plaintiffs' allegations makes this issue especially significant, since Avis will apparently be able to argue in defense that an individual plaintiff does not have a "Jewish sounding name" or a "Jewish accent." If Avis was unable to determine whether a caller-applicant was Jewish at the time that the caller applied for a corporate account, then it would have been impossible for Avis to have intentionally discriminated against the caller on the basis of his or her ethnicity.

Appendix A

Title VII enacted in the Civil Rights Act of 1991, see Pub.L. No. 102-166, 105 Stat. 1071, 1075 (1991) (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)), do not apply to claims brought under section 1981); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270-71 n.21, 97 S. Ct. 555, 566 n.21, 50 L. Ed. 2d 450 (1977) (in race discrimination case brought under the Fourteenth Amendment, proof by the defendant "that the same decision would have resulted even had the impermissible purpose not been considered" would establish that "the complaining party . . . no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose"); cf. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285, 97 S. Ct. 568, 575, 50 L. Ed. 2d 471 (1977) (same, in case alleging violation of plaintiff's free speech rights under the First and Fourteenth Amendments). For these reasons, we hold that the plaintiffs have failed to meet the predomination requirement of Rule 23(b)(3).

B.

Plaintiffs argue that the Supreme Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977), compels a different result. Teamsters was a pattern or practice employment discrimination case in which the government proved that "racial discrimination was the company's standard operating procedure — the regular rather than the unusual practice." Id. at 336, 97 S. Ct. at 1855. Given this finding, the Court held that

> the proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. With regard to individual relief, the Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976), the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Id. at 362, 97 S. Ct. at 1868 (footnote omitted).[16] It is clear that Teamsters applies in private class actions alleging

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16. The importance of a finding of class-wide discrimination in subsequent individual proceedings in the employment context is justified by the burden imposed on the plaintiff class to bring forth evidence of a policy or practice of discrimination sufficient to allow a court to conclude (absent an employer's rebuttal) that every member of the plaintiff class suffered illegal discrimination by the employer. Compare Teamsters, 431 U.S. at 342 n.23, 97 S. Ct. at 1858 n.23 (finding pattern or practice of discrimination where number of African-Americans and Spanish-surnamed persons hired for line-driver positions approached "the inexorable zero") (citation omitted); Paradise v. Prescott, 767 F.2d 1514, 1529 (11th Cir.1985) (pattern or practice established where plaintiffs demonstrated that "in the 37 years preceding the institution of the lawsuit the employer did not have a single black on its . . . payroll") with Reynolds v. Roberts, 202 F.3d 1303, 1319 n.27 (11th Cir.2000) (suggesting that

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systemic disparate treatment in employment. See Franks, 424 U.S. at 772, 96 S. Ct. at 1268 (holding in class action context that a demonstration by the plaintiff class of the existence of a discriminatory pattern or practice establishes a presumption that the individual class members had been discriminated against on account of race); Cooper v. Federal Reserve Bank, 467 U.S. 867, 875-76 & n.9, 104 S. Ct. 2794, 2799 & n.9, 81 L. Ed. 2d 718 (1984) (affirming Franks); Foster v. Board of School Comm'rs, 872 F.2d 1563, 1565 (11th Cir.1989); Freeman, 700 F.2d at 1356.[17] Further, Teamsters applies in employment discrimination cases brought under section 1981 to the same degree that it applies

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it would be difficult to establish that the employer was engaged in a pattern or practice of racial discrimination since "it is undisputed that the employer hired thousands of blacks" and promoted many of them to positions equal or superior to those to which their white counterparts were assigned).

17. Some of our cases have been in conflict with regard to whether, subsequent to the establishment of a pattern or practice of discrimination, individual plaintiffs get a presumption in favor of individual relief, or whether the showing of class-wide discrimination creates an inference that any particular employment decision was made pursuant to the employer's discriminatory policies. Compare Foster, 872 F.2d at 1565 ("Because plaintiffs had already proven that the school board had engaged in a pattern or practice of discrimination . . . each member presumptively was entitled to relief . . . .") with Freeman, 700 F.2d at 1356 ("During the remedial phase of a pattern or practice case an inference existed that any particular employment decision was made pursuant to the Company's discriminatory employment policies."). We need not address the issue here, because we find that the Teamsters rationale does not apply in the instant case.

in cases brought under Title VII. As the former Fifth Circuit stated in Lee,

> the principles governing an individual's right to back pay and injunctive relief in cases of class-based employment discrimination brought under 42 U.S.C. §§ 1981 and 1983 are clear. Once purposeful discrimination against a class is proved, a presumption of an entitlement to back pay and individual injunctive relief arises with respect to the members of that class. The burden of proof then shifts to the employer to show . . . that the individual member of the class seeking relief would not have been hired absent the discrimination.

Lee, 625 F.2d at 1239. Plaintiffs therefore argue that since the establishment of a policy or practice of discrimination shifts the burden to the defendant to establish that each member of the plaintiff class is not entitled to relief, the policy or practice issue must necessarily predominate under Rule 23(b)(3).

The argument must fail for two reasons. First, the Teamsters rationale is particularly appropriate in employment discrimination cases because of the relationship between a finding of systemic disparate treatment by an employer, and a plaintiff's burden under McDonnell Douglas to establish a prima facie case of individual disparate treatment. After a pattern or practice of discrimination has been proven, Teamsters mandates that in order to gain individual relief plaintiffs must come forward and "show that they unsuccessfully applied for a job." Teamsters, 431 U.S. at

362, 97 S. Ct. at 1868.[18] On the other hand, without a finding of class-wide discrimination, under McDonnell Douglas individual plaintiffs would have to come forward and show that (i) they belong to a racial minority; (ii) they applied and were qualified for the job at issue; (iii) they were rejected; and (iv) after the rejection, the position remained open and the employer continued to seek applicants, or the position was filled by a member of an unprotected class. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. By comparing these two burdens imposed on individual plaintiffs (the burden on the plaintiff who can benefit from a previous finding of class-wide discrimination (as in Teamsters), and the burden imposed on the plaintiff who does not have the benefit of such a finding (as in McDonnell Douglas)), it becomes clear that the way in which a finding of systemic disparate treatment functions in an individual plaintiff's case is as a substitute for a prima facie finding that the plaintiff was qualified. The requirement that individual plaintiffs must come forward and "show that they unsuccessfully applied for a job," after it is already established that the employer was engaged in a pattern or practice of discrimination, means that individual plaintiffs are never relieved of their burden of establishing that (i) they

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18. The primary relief afforded to the plaintiff class in a pattern or practice case is declaratory or injunctive. See Teamsters, 431 U.S. at 361, 97 S. Ct. at 1867 (holding that after a pattern or practice of discrimination has been established, "without any further evidence . . . a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order. . . ."). Individual plaintiffs are required to come forward and show that they unsuccessfully applied for a job only if they want individual relief.

belong to a racial minority (otherwise, they would not fit within the definition of the class); (ii) they applied for the job; (iii) they were rejected; and (iv) there was a position available for which the employer was seeking applications when the plaintiff applied.[19] The only McDonnell Douglas

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19. Requiring a plaintiff to demonstrate that he or she unsuccessfully applied for a job necessarily implies that the plaintiff must demonstrate that there was a job available for which the employer was seeking applications. This is somewhat different, however, from the fourth requirement imposed on a plaintiff in a McDonnell Douglas case to establish that after the plaintiff was rejected, the position remained open and the employer continued to seek applicants, or the position was filled by a member of an unprotected class. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. The fourth McDonnell Douglas requirement in part focuses on the same issue that individual plaintiffs are required to address in a Teamsters case — that is, whether or not there was ever a job available for which the employer was seeking applications. If there never was a job, it would be inappropriate to allow suits against the employer for wrongful rejection. Every member of every protected class would have a right to a job of his or her choice, regardless of whether or not there is a job to be had. But the fourth requirement in McDonnell Douglas asks the plaintiff to establish not only that there was a job available when the plaintiff applied, but also that the job was not filled by a member of a protected class (the job either has to have remained open, or it has to have been filled by a member of an unprotected class in order for the plaintiff to survive judgment as a matter of law). In a Teamsters case, plaintiffs have already brought forth evidence of a pattern or practice of discrimination sufficient to allow a court to conclude (absent an employer's rebuttal) that every member of the plaintiff class suffered illegal discrimination by the employer; therefore, if the individual plaintiff in a Teamsters case can establish that there was a job available when the plaintiff applied, then the court can assume that the position was not filled by a member of a protected class.

factor that individual plaintiffs are relieved from establishing in the first instance in a Teamsters case is that they were fully qualified for the job at issue. Teamsters therefore stands for the proposition that where a plaintiff class can demonstrate a policy or practice of discrimination so pervasive that a court is justified in concluding that qualifications were entirely irrelevant to the employer (because the employer would not hire, for example, an African-American, or a woman, or a Roman Catholic, no matter how well qualified), then individual plaintiffs are relieved of the prima facie burden of demonstrating that they were qualified for the job at issue in subsequent individual proceedings.

To understand this point is to see why the Teamsters rationale cannot apply in the instant case. In contrast to a McDonnell Douglas case, a plaintiff in this non-employment discrimination case will have to demonstrate that (1) he or she is a member of racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute. The second requirement is more demanding than any of the requirements imposed on plaintiffs in a McDonnell Douglas case, requiring, as it does, that the plaintiff bring forth evidence of actual intent on the part of the defendant. A finding that Avis has a policy or practice of discrimination could not possibly function as a meaningful substitute for the establishment of an actual intent to discriminate against an individual plaintiff on the basis of his or her ethnicity. This is because the legitimate reasons why Avis might have judged an individual plaintiff to be "unqualified" for a corporate account are far more various

and individualized than in the employment context. The requirement that an individual demonstrate that he or she is "qualified" for a job under McDonnell Douglas is not particularly rigorous; the same does not hold true in the instant case where Avis may have refused to contract with a plaintiff for any number of reasons having nothing to do with the plaintiff's ethnicity.[20] Thus, even if plaintiffs could establish a generalized policy or practice of discrimination, they still would not have established that the policy was implemented (and, thus, that Avis actually intended to discriminate) in their individual cases.

Second, and more important, the relief to which individual plaintiffs were entitled after a finding of a pattern or practice of discrimination in Teamsters (and in all subsequent cases employing the Teamsters rationale) was equitable in nature. Teamsters concerned awards of seniority to members of the putative class. Back pay has also been characterized as an equitable form of relief. See Holmes, 706 F.2d at 1152 ("A demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy.") (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir.1969)); Allison, 151 F.3d at 415 ("Back pay, of course, has long been recognized as an equitable remedy under Title VII."). In the instant case, plaintiffs have prayed for compensatory and punitive damages under section 1981. These forms of relief are anything but equitable in nature; they are, in fact,

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20. See supra Part III.A., listing some of the many legitimate reasons why Avis might choose to deny a corporate account to a particular applicant, or terminate an existing account.

the very definition of legal relief. The Supreme Court's decision in Carey v. Piphus, 435 U.S. 247, 264, 98 S. Ct. 1042, 1052, 55 L. Ed. 2d 252 (1978), makes clear that in order to receive compensatory damages, individual plaintiffs must prove that "injury actually was caused." This is especially true since compensatory damages under section 1981 can include damages for emotional and psychological distress. See Ferrill v. The Parker Group, Inc., 168 F.3d 468, 476 (11th Cir.1999).

The Teamsters framework is, therefore, inappropriate in the instant case because the establishment of a policy or practice of discrimination cannot trigger the defendant's liability for damages to all the plaintiffs in the putative class. To establish that they are entitled to compensation, plaintiffs will have to prove that they actually suffered some injury, whether it be emotional or otherwise. The idea that individual injury could be settled on a class-wide basis is preposterous. Plaintiffs' claims for damages must "focus almost entirely on facts and issues specific to individuals rather than the class as a whole: what kind of discrimination was each plaintiff subjected to, and how did it affect each plaintiff emotionally and physically, at work and at home." Allison, 151 F.3d at 419; see also Holmes, 706 F.2d at 1156 ("Money damages are directly related to the disparate merits of individual claims and are not generally applicable to the claims of the class as a whole.") (quoting Rosen, Title VII Classes and Due Process: To (b)(2) Or Not To (b)(3), 26 Wayne L.Rev. 919, 923 (1980)); Bogard v. Cook, 586 F.2d 399, 409 (5th Cir.1978) (finding that case would probably not have been certifiable under Rule 23(b)(3) if money damages had been sought for each member of the

class, because "given the lack of common questions of fact as to many of those claims, and the unmanageability of the suit had they been included, we cannot believe that the district court would have allowed the claims as part of that action if they had been recognized as potentially possible").

To understand, further, why liability for damages is a necessarily individualized inquiry, we have only to consider the disaster that would befall any class-wide settlement of this case. Suppose that the district court was called upon to approve a settlement fund to compensate all worthy plaintiffs in the class. First, what could possibly be a fair amount for such a fund? $100 thousand? $10 million? $100 million? We have no idea, and neither would the district court. It would be impossible to calculate the sum of damages necessary to compensate all the class members (including a sum of damages representing the mental and emotional distress suffered by all the plaintiffs), because each plaintiff's damages will be dependent on what kind of discrimination the plaintiff was subject to, and what harm resulted. Any class-wide figure arrived at would not just be a guess at a fair settlement amount; the court might as well come up with ten numbers at random, take their average, square that amount, and add six. Whatever number the court came up with through this "method" would bear just as much a relationship to a reasonable settlement amount as a number arrived at through any other means.

Moreover, how could the court identify individual members of the class who would be entitled to compensation from the fund? Is every Jewish person who has ever been denied a corporate account by Avis entitled to compensation?

What if the individual was able to procure a corporate account elsewhere, and therefore suffered no actual damage? What of the Jewish applicant who does not have a "Jewish sounding name" or a "Jewish accent"? We are not even certain what a "Jewish sounding name" or a "Jewish accent" is. But apparently, if an individual plaintiff did not have one or the other, then there is no way that Avis could have identified the plaintiff as Jewish (absent some other self-identification initiative on the part of the plaintiff — there is no allegation that Avis ever actually asked anyone if they were Jewish). Should plaintiffs without a "Jewish sounding name" or a "Jewish accent," therefore, be compensated? All of this goes to demonstrate the profoundly individualistic nature of each plaintiff's claim for damages, and the complete lack of judicial economy in certifying this case as a class action.

IV.

Counsel for the plaintiffs and amici predict that a denial of class certification in this case will mean the end of all disparate treatment class actions in the Eleventh Circuit.[21]

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21. At oral argument, counsel for the plaintiffs claimed that a decision by this court to decertify the class in the instant case under Jackson would "eviscerate more than 100 years of civil rights cases." Doubtless, counsel was warning against a return to the Supreme Court's infamous decision to uphold the doctrine of "separate but equal" in Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). We are mystified as to how our decision to require conformance with the requirements of Federal Rule of Civil Procedure 23 could possibly be equated with the now repudiated Plessy decision. Given that individual plaintiffs may be entitled to substantial compensatory and punitive damage recoveries should

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In response to this dire prediction, we find it appropriate to note, in conclusion, what this case is not about. This is not a case alleging employment discrimination. Nor is it a case only involving claims for injunctive and declaratory relief. This is a case in which plaintiffs have sought to represent a class of "thousands" of Jewish plaintiffs who purportedly reside throughout the United States, and who, plaintiffs allege, were all either turned down for a corporate account, given a less advantageous account, or had their account terminated because the defendant discovered their ethnic identity through its practice of monitoring customer calls to identify callers with a "Jewish sounding name" or "Jewish accent." Every member of the putative class seeks compensatory and punitive damages. The idea that proof of a policy or practice of discrimination could establish that every member of the class is entitled to such damages is, given the substantive elements of the underlying cause of action, untenable. Similarly, given that every member of the class will have to prove actual damage in order to receive compensation for their loss, the policy or practice issue cannot possibly predominate over all the other issues in the case that are necessarily capable of only individualized resolution.

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they prevail, the most compelling justification for a Rule 23(b)(3) class action — the possibility of negative value suits, see Amchem, 521 U.S. at 617, 117 S. Ct. at 2246 — is absent in this case. Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Our decision today, therefore, does not represent the end of the disparate treatment class action in the Eleventh Circuit. Today we merely recognize, and not for the first time, that Rule 23 imposes certain requirements on civil rights class actions, just as it does on any other kind of class action. See Falcon, 457 U.S. at 156, 102 S. Ct. at 2369-70. In the future, to determine whether class action status is appropriate, parties should look to the substantive law relating to the cause of action that is common to each class member, including whether the substantive law supports a "pattern or practice" theory of individual recovery, as well as to the type of relief sought and whether that relief is capable of class-wide resolution or is necessarily individualized.

V.

For the foregoing reasons, we find that the district court abused its discretion in certifying a class under Rule 23(b)(3). We REVERSE the district court's class certification decision, and REMAND for further proceedings not inconsistent with this opinion.

SO ORDERED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING CLASS CERTIFICATION DATED AND FILED FEBRUARY 8, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-0807-CIV-GOLD

ZEIREI AGUDATH ISRAEL and LEVI SUFRIN,
On Behalf of themselves and as a Representative
of a Class of all others similarly situated,

Plaintiffs,

vs.

AVIS RENT-A-CAR SYSTEMS, INC.,
a Delaware corporation,

Defendant.

ORDER GRANTING CLASS CERTIFICATION

Zeirei Agudath Israel and Levi Suffrin claim that Avis Rent-A-Car Systems, Inc., denied them the benefits of a corporate car-rental account on the basis their religion and ethnicity in violation of 42 U.S.C. § 1981.[1] Specifically, the

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1. Section 1981 in its entirety reads as follows:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to

(Cont'd)

plaintiffs allege that Avis has created and maintains a "Yeshiva" policy that discriminates against Jewish persons and businesses. Plaintiffs ask this court to certify a class of similarly situated Jewish individuals and businesses who were denied the benefits of an Avis corporate account. Avis contends that *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997) precludes class certification of this, and other disparate treatment cases, because individual questions of law and fact will predominate over common issues. In response to Avis's argument, plaintiffs assert that

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(Cont'd)

> make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (1994).

Jackson does not mandate denial of their motion for class certification because this case is factually distinguishable from *Jackson*. Plaintiffs further assert that Avis reads *Jackson* too broadly and that it does not preclude all class actions for disparate treatment. Although the parties disagree as to other class certification issues, the central issue before the court is whether, in light of the Eleventh Circuit's opinion in *Jackson*, the court should certify a class of Jewish individuals and businesses who allegedly have been denied the benefits of an Avis corporate account on the basis of their religion and ethnicity. For reasons stated below, the court concludes that class certification is proper.

I. FACTS

The corporate telesales department of Avis-Rent-A-Car is located at Avis's World Reservations headquarters in Tulsa, Oklahoma. The telesales or telemarketing division responds to calls from prospective customers who want to rent cars, including those who wish to open corporate accounts. Customers with corporate accounts are entitled to substantial discounts in the price of car rentals and receive corporate award points toward free car rentals. Avis's normal policy is to establish a corporate account for callers who are at least twenty-five years old and will rent a car at least once a month. Ordinarily, when an Avis employee establishes a corporate account, he or she gives the account an identification number that begins with the letter "L".

The complaint alleges that in the early 1990's, the telemarketing division established a policy that segregated callers who had a Jewish accent or a Jewish-sounding name

into a special category. These callers were called "Yeshiva."[2] According to the testimony of current and former employees of Avis's telemarketing division[3], Yeshiva who called Avis's telemarketing division and requested a corporate account

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2. The word "yeshiva" is defined in *The Random House Dictionary of the English Language* (Unabridged Edition) as follows: 1. an Orthodox Jewish school for the religious and secular education of children of elementary school age. 2. an Orthodox Jewish school of higher instruction in Jewish learning, chiefly for students preparing to enter the rabbinate.

3. Plaintiffs rely on the testimony of William Bruce Ward, a former Avis employee of the Corporate Telesales Department located at Avis's World Reservations Headquarters In Tulsa, Oklahoma; Elaine Rodgers and another former Avis employee regarding the existence and application of the centralized Yeshiva policy to discriminate against Jewish persons. Both Mr. Ward and Ms. Rodgers gave a sworn declaration and deposition testimony to that effect in *Pugh v. Avis Rent A Car System, Inc.*, Case Number 7-96-CV-91-F(2), United States District Court for the Eastern District of North Carolina. The *Pugh* was a class action filed in the Eastern District of North Carolina, alleging racial discrimination by Avis rental car franchises owned by New Hanover Rent-A-Car, Inc. The purported class consisted of African-American customers of Avis who claim that the New Hanover Avis franchises denied them the right to reserve and rent cars on the same terms as white individuals. *Pugh v. Avis Rent A Car System, Inc.*, 1997 WL 669876 (S.D.N.Y. 1997). The *Pugh* case was eventually settled. In addition, the plaintiffs rely on deposition testimony of current Avis employees, in supervisory and management positions, including Stephen Culley, Manager of Customer Service for Sales and Services in the Telesales Department for Avis; Shirley Cagle, an Avis account service agent; Michael Fitch, Director of Telesales since 1987; Fred Kruse, a Telesales Group leader since 1993; Wade Cook, a Telesales Manager, and various internal Avis documents.

would not be given a regular corporate account. Some individuals identified as Yeshiva were denied a corporate account entirely. Others were given a so-called "bogus" corporate account, an account that carried a smaller discount than the normal discount rate and did not award the user corporate points. Yeshiva accounts were assigned an identification number that began with the letter "T" or "B". As stated by a former Avis employee, designating bogus corporate accounts in this manner "gave the client the illusion that [he] had opened a corporate account." The complaint further alleges that the Yeshiva policy was also used to cancel corporate accounts once it was discovered that the account holders were Jewish.

Avis admits that it has a "Yeshiva" policy. In fact, Fred Cook, an Avis Telesales Group Leader, stated in a memorandum to Avis sales representatives, "Our friends, the Yeshiva's are beginning to call again more frequently (Please take no offense if any of you are of the Jewish faith.)," [Plaintiffs' Exhibit A to its certification motion] and "You have Wade's approval to be firm with these people in your denying an account if legitimacy cannot be proved." [*Id.*]. Avis contends, however, that the policy has nothing to do with religious discrimination; rather, it claims that the Yeshiva policy is utilized to alleviate the problem of *all* underage drivers [under twenty-five years of age] attempting to use corporate accounts to circumvent the minimum age requirement for renting Avis cars.[4]

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4. Avis will not rent to drivers under the age of twenty-five unless the car is rented through a corporate account.

Appendix B

The named plaintiffs filed this lawsuit alleging that they were denied accounts because they are Jewish. They want to represent a class of all other Jewish individuals who were similarly denied the benefits of an Avis account on the basis of their religion and ethnicity. The complaint seeks declaratory and injunctive relief as well as damages pursuant to 42 U.S.C. § 1981.

II. CLASS ACTION CERTIFICATION

To qualify as a class under Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs must initially satisfy the four thresholds requirements of Rule 23(a): (1) the class must be so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class must exist (commonality); (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (typicality); and (4) the representative parties must fairly and adequately protect the interests of the class (adequacy of representation). Plaintiffs seeking to represent the class bear the burden of establishing that all four requirements have been met. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 721 n.2 (11th Cir. 1987); *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984) (A class action may only be certified "if the Court is satisfied, after a rigorous analysis, that the prerequisites of Fed.R.Civ.P. 23(a) are met"). These prerequisites are mandatory and the failure to establish any one is fatal to a motion for class action certification.

In addition to meeting the four preliminary requirements in subdivision (a), the plaintiffs must then satisfy one of the

subsections of Fed.R.Civ.P. 23(b) in order for the lawsuit to be maintained as a class action. The plaintiffs assert that they satisfy Rule 23(b)(2) (the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole), and Rule 23(b)(3) (questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy).

It is axiomatic that in order for a class to be certified, the class must be capable of definition. The primary concern underlying the requirement of a class capable of definition is that the proposed class not be amorphous, vague, or indeterminate. 1 H. Newberg, *Newberg on Class Actions* 75 (1977). A class will be deemed sufficiently definite if it is administratively feasible to determine whether a given individual is a member of the class. *Aiken v. Obledo*, 442 F.Supp. 628, 658 (E.D. Cal. 1977); *see Ford v. United States Steel Corp.*, 638 F.2d 753, 756 (5th Cir. 1981). Classes certified under Rule 23(b)(3) require a precise class definition in order to provide the type of notice to class members required by Rule 23(c)(2) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1973). In this case, plaintiffs propose a class consisting of the following persons.

> All Jewish individuals and Jewish-owned businesses who, subsequent to January 1, 1990, have attempted to contract, have contracted, or

> will in the future contract with Avis to open an account for use in their business, and who were refused an account, had their account canceled, or were given a less advantageous account because of their religion, ancestry, and/or ethnicity.

The court finds this definition acceptable because it is sufficiently precise to determine whether a given individual is a member of the class.[5]

A. CERTIFICATION UNDER RULE 23(a).

Avis challenges class certification arguing that the plaintiffs have failed to meet at least three of the threshold requirements of Rule 23(a).

1. NUMEROSITY.

The numerosity requirement ensures that a lawsuit will proceed as a class action only if there is a real need for class certification. Under Rule 23(a)(1), the numerosity requirement is met if joinder of all members is impracticable. This requirement does not demand that joinder would be

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5. Because the court has the discretion to limit or redefine the class in an appropriate manner, however, it finds that money damages shall be limited to only those class members ascertainable at the time of the judgment. Injunctive or declaratory relief is appropriate for future members. *See Taliaferro v. State Council of Higher Education*, 372 F.Supp. 1378 (E.D. Va. 1974); *Rappaport v. Katz*, 62 F.R.D. 512 (S.D.N.Y. 1974), and *Green v. Missouri Pacific Railroad Co.*, 62 F.R.D. 434 (E.D. Mo. 1973).

impossible, but rather that joinder would be extremely difficult or inconvenient. *Walco Invests., Inc. v. Thenen*, 168 F.R.D. 315, 324 (S.D. Fla. 1996) (impracticable does not mean impossible). Whether joinder of all of the class members would be impracticable depends on the circumstances surrounding the case and not merely on the number of class members. *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992). Factors the court should consider include the geographic dispersion of the class members, judicial economy, and the ease of identifying the members of the class and their addresses. *Kilo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (court looks to size of class, ease of identifying its members, facility of serving process on them, and their geographic dispersion); *Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 598-599 (S.D. Fla. 1991).

To satisfy numerosity, the plaintiffs must proffer some evidence of the number of members in the purported class, or at least a reasonable estimate of that number. *In re Amerifirst Sec. Litig.*, 139 F.R.D. 423, 427 (S.D. Fla. 1991). The court may "make common sense assumptions in order to find support for numerosity." *Evans v. United States Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983). It is not necessary that the precise number of class members be known. *Barlow v. Marion County Hosp. Dist.*, 88 F.R.D. 619, 625 (M.D. Fla. 1980). The Eleventh Circuit has held that "while there is no fixed numerosity rule, 'generally less than twenty-one is inadequate, more than forty adequate,' with numbers between varying according to other factors." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (quoting 3B *Moore's Federal Practice* section 23.05(1) n.7 (1978)).

Appendix B

In this case, the plaintiffs assert that the class could consist of thousands of members. The evidence on which they base this assertion includes deposition testimony of former and current Avis employees and Avis's internal documents. For example, one former Avis employee, Bruce Ward, estimated at his deposition that he had turned down thousands of potential customers who had been identified as "Yeshiva." Additionally, during discovery, Avis disclosed the names of forty persons who had been denied accounts in 1994, 1995, or 1996 because they were "Underage Yeshiva." The plaintiffs argue that the existence of this 40-person list is in itself sufficient to satisfy the numerosity requirement.

The court finds that allegations of the complaint present several factors which support the plaintiffs' numerosity argument. First, the evidence indicates that the class could include a large number of persons. Second, the relevance of the numerosity requirement may be less significant in cases alleging class-wide discrimination. *Evans*, 696 F.2d at 930. Third, potential class members are geographically dispersed across the United States. Wide geographic dispersion of the potential class members supports a finding that joinder would be impracticable. *See Kernan v. Holiday Universal, Inc.*, 1990 WL 289505 (D. Md. 1990) (numerosity requirement met where defendant's company-wide policy of discrimination existed throughout its nationwide chain of spas); *Allen v. Isaac*, 99 F.R.D. 45 (N.D. Ill. 1983) (although class of seventeen black employees was not large, geographical dispersion across United States rendered their joinder impracticable). Fourth, the plaintiffs' claims for damages involve only a small amount of money, making it unlikely that they would file separate actions. *See Auto Ventures, Inc.*

v. Moran, 1997 WL 306895 (S.D. Fla. 1997) (Rule 23 appropriate for redressing rights in cases where claim is otherwise too small to warrant individual litigation). Finally, where the question on numerosity is a close one, a balance should be struck in favor of a finding of numerosity because the court always has the option to decertify pursuant to Rule 23(c)(1). *Evans*, 696 F.2d at 930.

Avis asserts that the plaintiffs have failed to satisfy the numerosity requirement because only two members of the putative class have been identified despite extensive discovery and widespread publicity. On its face, Avis's point is well-taken. But, on balance, applying the factors enumerated above, the court finds that the numerosity requirement has been met on a preliminary basis sufficient to warrant a conditional certification, subject to further evidence as to the actual number of potential class members who may fit the class definitions. Under the circumstances of this case, identifying class members is difficult because much of the information is within the defendant's control. Moreover, because many callers identified as Yeshiva were given a corporate identification number, and were not told that they did not have full benefits, they were unaware of the alleged discrimination. Decertification may be appropriate, following further discovery, if it appears that the plaintiffs are unable to identify a sufficient number of persons who were denied the full benefit of Avis corporate accounts because they were Jewish. *Siles v. ILGWU Nat'l Retirement Fund*, 783 F.2d 923, 930 (9th Cir. 1986).

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2. COMMONALITY

The second prerequisite of Rule 23(a) is that there must be questions of law or fact common to the class. Commonality[6] requires that there is at least one issue affecting all or a significant number of proposed class members. *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982);[7] *Kreuzfeld v. Carnehammar*, 138 F.R.D. 594, 599 (S.D. Fla. 1991). The commonality requirement ensures that the interests of other class members will be fairly and adequately protected. *Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 n.10 (11th Cir. 1983). The threshold for commonality is not high. *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993). Factual differences between class members do not preclude a finding of commonality. *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992); *see also Walco Invests., Inc. v. Thenen*, 168 F.R.D. 315, 324 (S.D. Fla. 1996) (not all of the questions of law or fact raised by the case have to be common to all the plaintiffs). The law requires only that the claims actually litigated in the lawsuit must be those fairly represented by the named plaintiffs. *Cox*,

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6. The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether, under the particular circumstances, maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *General Telephone Co. of Southwest v. Falcon*, 102 S.Ct. 2364, 2370 n.13 (1982).

7. The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1982.

784 F.2d at 1557 (citing C. Wright & A. Miller *Federal Practice & Procedure*, § 763 at 603); see also *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 532 (5th Cir. 1978). Where a common scheme is alleged, common questions of law or fact will exist. *See Green v. Wolf Corp.*, 406 F.2d 291, 298 (2nd Cir. 1968); *Powers v. Stuart-James Co.*, 707 F.Supp. 499, 502 (M.D. Fla. 1989); *Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. 864, 877 (S.D. Fla. 1988). "[S]uits alleging racial or ethnic discrimination are often by their very nature class suits involving classwide wrongs. Common questions of law or fact are typically present." *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977).

In this case, the plaintiffs allege that for many years Avis implemented and maintained a nationwide Yeshiva policy that segregated Jewish customers for corporate accounts into a group that received no benefits or fewer than those provided to customers who were not Jewish. The discriminatory manner in which Avis allegedly treated all persons believed to be Jewish is the common issue of law and fact shared by the individual and class members. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2nd Cir. 1986) (a discriminatory evaluation system applied by one central group to all class members suffices for Rule 23(a) purposes); *Kernan v. Holiday Universal, Inc.*, 1990 WL 289505 (D. Md. 1990) (discriminatory nature of defendant's organization is common issue of law and fact shared by individual and class members). Indeed, as discussed further below, the plaintiffs' claims will stand or fall on the resolution of a single common issue germane to the named plaintiffs and the potential class members: did Avis adopt

and implement a centralized practice or policy, applied nationwide from its corporate headquarters, of religious or ethnic discrimination against Jewish persons and businesses, or was the policy, as Avis claims, utilized to alleviate the problem of *all* underage drivers attempting to use corporate accounts to circumvent age requirements for renting Avis cars? This single issue common to all class members is alone sufficient to satisfy Rule 23(a)(2).

3. TYPICALITY

In order to satisfy the "typicality" prerequisite of Rule 23(a), plaintiffs must show that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). The central inquiry in determining whether a proposed class has "typicality" is whether the "class representative [is] part of the class and 'possess[es] the same interest and suffer[s] the same injury' as the class members." *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 2929, 41 L.Ed.2d 706 (1974)). When ascertaining whether typicality exists, the district court is "to focus on whether the named representative's claims have the same essential characteristics as the claims of the class at large." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). Moreover, the typicality requirement may

be satisfied even if there are factual distinctions between the claims of the named plaintiff and other class members, unless the factual position of the representative markedly differs from that of other members of the class. *Id.*

Here the named plaintiffs' claims are sufficiently "typical" of the claims of the class as a whole so as to satisfy Rule 23(a)(3) requirements. The complaint alleges that the defendant engaged in a continuous course of conduct which evidenced a company-wide policy of discrimination against Jewish individuals and businesses. Plaintiffs allege that the absent members have similar grievances arising from the defendant's discriminatory policy and practices. Since the named plaintiffs' claims arise from the same conduct that gives rise to the claims of the class members, the claims of the named plaintiffs are based on the same legal theory as the class members. Furthermore, the relief sought by the named plaintiffs is compatible with the relief sought by the class. *Kernan v. Holiday Universal, Inc.* For these reasons, the named plaintiffs' claims are typical of the claims of the class, and the typicality requirement is met. *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3rd Cir. 1992).

Avis argues that the United States Supreme Court decision in *General Telephone Co. of Southwest v. Falcon*, 102 S.Ct. 2364 (1982) requires a different result. The court respectfully disagrees. The named plaintiff in *Falcon* was a Mexican-American who was refused a promotion, allegedly on the basis of his national origin. He filed an across-the-board discrimination class action against his employer alleging that the employer maintained a practice of discriminating against Mexican-Americans because of their

national origin "with respect to the compensation, terms, conditions, and privileges of employment. . . ." The complaint contained no factual allegations concerning the employer's hiring practices. The Supreme Court framed the issue as follows:

> The question presented is whether respondent Falcon, who complained that petitioner did not promote him because he is Mexican-American, was properly permitted to maintain a class action on behalf of Mexican-American applicants for employment whom petitioner did not hire.

457 U.S. at 149. The Court found that the claim of Falcon, who had been hired by the defendant but denied a promotion, was not typical of the claims of other class members, Mexican-Americans who had been denied a job on the basis of their national origin. Evidence presented by Falcon in support of his individual claim for discriminatory promotion practices was entirely different from the evidence required to prove the claims of class members who were not hired. Factual allegations about hiring practices were lacking in the complaint. Consequently, the Court held that the trial court should not have certified the class for across-the-board discrimination. As noted by the Supreme Court, there is a wide gap between (a) the individual's claim that he has been denied a promotion on discriminatory grounds, and *his otherwise unsupported allegation that the company has a policy of discrimination*, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the

individual's claim will be typical of the class claims. *Falcon*, 457 U.S. at 157, 102 S.Ct. at 2370-71 (emphasis added).

Here the situation is different. The named plaintiffs have evidence related to their individual claims of discrimination, but also have specific testimonial and documentary evidence which, if substantiated, shows that Avis utilizes a company-wide policy of discrimination against Jewish persons and businesses seeking to maintain corporate accounts. This documentary and testimonial evidence of discrimination emanating from Avis's corporate headquarters sufficiently "bridges the gap" between the claims of the named plaintiffs and those of the class without the need to rely solely on "inferences" from the particular experiences of the named plaintiffs in order to demonstrate that the class claims are "fairly encompassed" within the claims of the named plaintiffs. *See Falcon*, 457 U.S at 158-59, 102 S.Ct. at 2371. The need to resort to such inferences in *Falcon* demonstrated that the class claims were not in fact "fairly encompassed" within Falcon's individual claim. *Id.* If the plaintiffs' allegations of across-the-board discrimination against Jewish customers in this lawsuit were based solely on their individual experiences with Avis, the court agrees that class certification would be inappropriate under the standards set forth in *Falcon*. But here the named plaintiffs have significant evidence which, if true, shows that Avis operated under a general policy of discrimination against Jewish individuals and businesses seeking to obtain and retain corporate accounts.[8]

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8. *See Falcon*, 457 U.S. at 159 n.15 ("Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotions practices in the same general fashion. . . .").

Appendix B

4. ADEQUACY OF REPRESENTATION

The fourth condition of Rule 23(a) provides that the representative party must "fairly and adequately protect the interests of the class." Under this criterion, the named plaintiffs must ensure that (1) no conflict of interest exists between them and the putative class members and that (2) the action will be vigorously prosecuted. *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). The purpose of this requirement, as with Rule 23's other procedural mandates, is to protect the legal fights of absent class members. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987).

Courts interpreting the first prerequisite of 23(a)(4) have held that "the primary criterion is the forthrightness and the vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Schatzman v. Talley*, 91 F.R.D. 270, 273 (N.D. Ga. 1981). In addition, the representative must not have interests which are antagonistic to those of the planned class. *Gonzales v. Cassidy*, 474 F.2d 67, 73 n.10 (5th Cir. 1973). With respect to class actions for disparate treatment, "the mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination" *Falcon*, 457 U.S. at 157.

According to Avis, the class representatives in this case cannot adequately represent the members of the class because their claims are subject to unique defenses. *See Hall v. Moran*, 1997 WL 306895 (S.D. Fla. 1997) (class certification

inappropriate where putative class representative is subject to unique defenses which threaten to become the focus of the litigation) (citing *Gary Plastic Pkg. Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176 (2nd Cir. 1990)). Avis argues that Suffrin, a student whose name was placed in Avis's Name Risk File, has submitted no evidence that he ever tried to obtain or held an Avis corporate account in his name and is therefore unlikely to prevail. With respect to Zeirei Agudath Israel bookstore, Avis contends that it canceled the bookstore's corporate account for two valid reasons: it had too little rental activity and its rental activity was mostly from renters under the age of twenty-five. In other words, Avis insists that its conduct with respect to the named plaintiffs had nothing to do with the discrimination. But this assertion essentially goes to the merits of the case, and is not appropriate to the issue of class certification now before the court. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (in determining whether to certify a class, the appropriate inquiry is not whether the plaintiffs will prevail on the merits, but whether the requirements of Rule 23 have been met). Both plaintiffs have alleged that they were denied the benefits of an Avis corporate account because of their religion. As such, their interests in the litigation are in common with, rather than in conflict with, the interests of the putative class. A determination that a party can adequately protect the interests of a class is factual and depends on the circumstances of each case. *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir. 1983). Based on the allegations of the complaint, the named plaintiffs have satisfied the first adequacy requirement of Rule 23(a)(4). If discovery progresses, and the evidence shows that Suffrin never had or applied for a corporate account, or was never

refused a rental under a corporate account, a determination may be made at that time that Suffrin is not an adequate class representative.

The second requirement of Rule 23(a)(4), is that the plaintiffs' attorneys must be "qualified, experienced and generally able to conduct the proposed litigation. . . ." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). It cannot be disputed that plaintiffs' counsel are experienced in complex litigation, including class actions. The court has observed the high quality of representation provided by plaintiffs' counsel throughout the past year. It finds that plaintiffs' counsel have the experience and skill to conduct this litigation.

Accordingly, the plaintiffs have satisfied the requirements of Rule 23(a).

B. CERTIFICATION UNDER RULE 23(b).

The real controversy in this case is whether the plaintiffs satisfy the requirements of any of the subsections of Rule 23(b). For in addition to the requirements of Rule 23(a), the named plaintiffs must also show that their action falls within one of the three categories of class suits described in subsection (b). *Hudson v. Delta Air Lines*, 90 F.3d 451 (11th Cir. 1996). The plaintiffs argue that this case is appropriate for certification under Rule 23(b)(2) or 23(b)(3), or both. Actions under 23(b)(2) are appropriate where the party opposing the class has acted on grounds generally applicable to the class and injunctive or declaratory relief is the primary relief sought. In contrast, 23(b)(3) is the section generally

invoked if the plaintiffs are seeking predominately money damages, common questions predominate over individual questions, and a class action is superior to other available methods of resolving the controversy. *See Taylor v. Flagstar Bank*, 181 F.R.D. 509 (M.D. Ala. 1998). In this case, the plaintiffs are seeking injunctive relief, declaratory relief, and money damages.

1. RULE 23(b)(2).

Rule 23(b)(2) class certification is warranted when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Plaintiffs contend that Avis has implemented a Yeshiva policy that discriminates against Jewish individuals or Jewish-owned businesses "who have attempted to contract, have contracted, or will in the future contract, with Avis to open an account for use in their business, and who were refused an account, had their account canceled, or were given a less advantageous account" because of their religion or ethnicity. Plaintiffs contend that the Yeshiva policy affected each class member in a manner that violates 42 U.S.C. section 1981, and that Avis has acted on grounds generally applicable to the class. "Generally applicable," as used in Rule 23(b)(2) has been interpreted to mean that the party opposing the class "has acted in a consistent manner towards members of the class so that his actions may be viewed as part of a pattern of activity, or to establish a regulatory scheme, to all members." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1775 at

449 (2d ed. 1986). Applying this interpretation, the court agrees with the plaintiffs that if Avis has implemented a "Yeshiva" policy that discriminates against Jewish individuals and businesses by denying them the full benefits of a corporate account on the basis of their religion or ethnicity, this is the type of pattern or practice envisioned by Rule 23(b)(2). *See* Notes of Advisory Comm. on 1966 Amendment to 23(b)(2), 28 U.S.C.A. App.

An action seeking monetary damages cannot fall under (b)(2) unless the final injunctive relief or corresponding declaratory relief is the primary relief sought. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir. 1986); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983); *Parker v. Local Union No. 1466*, 642 F.2d 104, 107 (5th Cir. 1981). Remedies available under 42 U.S.C. § 1981 include special damages, general compensatory damages, nominal damages, punitive damages, attorneys' fees, as well as declaratory and injunctive relief. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975); *Ferrill v. The Parker Group, Inc.*, 985 F.Supp. 1331 (N.D. Ala. 1997). The plaintiffs are seeking all the remedies provided by the statute. Consequently, the difficult issue in this case is whether the monetary relief is incidental to the plaintiffs' request for final injunctive or declaratory relief.

Plaintiffs assert that the primary relief they seek is equitable because this class action is being used chiefly as a device to eradicate widespread discrimination. *See Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 n.14 (5th Cir. 1968); *see also* 7A Wright & Miller, *supra*, § 1776, at 495-96. Statutory history of Rule 23(b)(2) shows the subsection was

intended primarily, although not exclusively, for use in "[c]ivil rights cases against parties charged with unlawful, class-based discrimination." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2245 (1997). Monetary relief is merely incidental in this case, according to the plaintiffs, because any compensatory damages to individual class members will be modest and a determination as to the amount of these damages is not likely to form a predominant part of the case. Morever, whereas equitable relief is being sought by all members of the class, it appears that a substantial number of plaintiffs may not be entitled to any compensatory damages because they have not incurred a monetary loss. Avis rejects this contention, arguing that where, as here, plaintiffs seek not only compensatory damages but also punitive damages, the issue of monetary relief will necessarily predominate.

Some courts and leading commentators have taken the position that determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided. *See e.g.*, 7A Wright & Miller, *supra* at 470. (Disputes over whether an action is primarily for injunctive relief or declaratory relief rather than a monetary award are counterproductive. "If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental."). Other courts have concluded that the drafters of Rule 23 intended to impose a predomination requirement for (b)(2) certification, consequently courts must give consideration to the issue of which form of relief actually

predominates. *See e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998). In accordance with the latter position, the court now addresses the parties' predominance arguments.

Avis's argument is supported by a recent decision by the Fifth Circuit which held that incidental damages permissible under (b)(2) are those that "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 411. In other words, "the recovery of incidental damages should typically be concomitant with, not merely consequential to, the injunctive or declaratory relief," and "should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Id.* Incidental damages should not "introduce new and substantial legal or factual issues." *Id.*; *accord Pickett v. IBP, Inc.*, 182 F.R.D. 647, 657 (M.D. Ala. 1998) (monetary relief not incidental where compensatory and punitive damages would require individualized proof); *Rice v. City of Philadelphia*, 66 F.R.D. 17, 20 (E.D. Pa. 1974) (damages may be awarded under (b)(2) as ancillary relief only in cases in which "the award of damage flows automatically from the grant of injunctive or declaratory relief, and in which the damages are subject to ready calculation on the basis of a formula or principles uniformly applicable to the class."). The *Allison* court concluded that compensatory and punitive damages are not incidental in disparate treatment cases because they require proof of how the discrimination affected each plaintiff. *Id.* at 417. *See also Pickett*, 182 F.R.D. at 647 ("convinced" that the Eleventh

Circuit would apply same analysis as *Allison*, court held that action filed under unfair trade practices act could not be certified as a class under (b)(2) because plaintiffs' claims for compensatory and punitive damages would require individualized proof and determinations).

Support for Avis's position also comes from other judges and authorities who have reasoned that claims for punitive damages can never be incidental because the amount involved is necessarily substantial, therefore, punitive damages cannot possibly be part of the relief available under (b)(2). *E.g.*, *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982); *Hernandez v. United Fire Ins. Co.*, 79 F.R.D. 419 (N.D. Ill. 1978); *see generally* 32B Am.Jur.2d *Federal Courts* § 1971 (1996).

The court finds that in this case, where the plaintiffs are seeking special damages, general compensatory damages, nominal damages, and punitive damages, the claim for damages is a significant portion of the total relief requested. Moreover, the issues involved in determining whether the plaintiff class is entitled to injunctive or declaratory relief are simply not the same issues involved in determining whether individual members of the class may be entitled to damages. Compensatory damages are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned and both the fact and extent of injury would require individualized proof. Under these circumstances, certification is not appropriate under (b)(2). *See Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463, 469 (W.D. La. 1995) (certification under (b)(2) not

proper where plaintiffs in civil rights case sought compensatory and punitive damages in addition to injunctive relief). In reaching this position, the court has also considered the Eleventh Circuit's opinion in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), wherein the court apparently dismissed outright the propriety of certifying that class under (b)(2) where the plaintiffs were seeking money damages in addition to injunctive relief for alleged violations of § 1981. *See Id.* at 1005 ("The only one of Rule 23[b]'s alternatives that is arguably fulfilled by the Jackson plaintiffs' claims is that found in Rule 23(b)(3) . . . .").

2. RULE 23(b)(3).

An action for money damages and injunctive relief can be certified under Rule 23(b)(3). To be certified under Rule 23(b)(3), however, the class must meet two prerequisites, neither of which is applicable under (b)(2): (1) the questions of law or fact common to the members of the class must predominate over any questions affecting only individual members; and (2) the class action must be superior to other available methods for the fair and efficient adjudication of the controversy. Actions brought under (b)(3) are also subject to the provisions in Rule 23(c)(2) requiring that notice be given to all members who can be identified through reasonable effort and each member has the option to be excluded from the class.

Appendix B

A. Predominance of common questions of law or fact.

Under Rule 23(b)(3), courts must consider whether common questions of law or fact "predominate" over purely individual questions. No precise test has been established to assist courts in determining which issues may or may not predominate. 5 *Moore's Federal Practice*, *supra*, at § 23.46. Generally, "when one or more of the central issues in the action are common to the class and can be said to predominate, the action will be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately." 7A Wright & Miller, *supra*, § 1778, at 529; *see also CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 699 (S.D. Fla. 1992) (if common questions predominate over individual questions as to liability, the predominance requirement can be satisfied even if individual damages issues remain). The predominance inquiry focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy," and is "far more demanding" than Rule 23(a)'s commonality requirement. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (citing *Amchem Prods., Inc. v. Windsor*, 117 S.Ct. 2231, 2249-50 (1997)). One issue that has been viewed as having overriding significance or predominance is the existence of illegal discrimination. *See Welch v. Board of Directors of Wildwood Golf Club*, 146 F.R.D. 131, 138 (W.D. Pa. 1993); *Bennett v. Gravelle*, 323 F.Supp. 203 (D. Md. 1971); *Gerstle v. Continental Airlines, Inc.*, 50 F.R.D. 213 (D.C. Colo. 1970).

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Avis argues that the Rule 23(b)(3) requirements are not met in this case because individual issues will predominate over issues common to the class. According to Avis, the Eleventh Circuit's decision in *Jackson v. Motel 6 Multipurpose Inc.*, 130 F.3d 999 (11th Cir. 1997), directing the decertification of a class because it failed the predominance requirement, precludes class certification in this case and any future disparate treatment discrimination cases brought in the Eleventh Circuit. The plaintiffs disagree, asserting that *Motel 6* is factually distinguishable from this case, and that *Motel 6* should not be interpreted to preclude all class actions alleging discrimination.

The lawsuit in *Motel 6* was brought by five motel customers who alleged that they were denied lodging or given substandard accommodations on the basis of their race. Two of the named plaintiffs were allegedly denied rooms at the same motel. Each of the other three plaintiffs were allegedly discriminated against at separate motels. The complaint charged that the motel chain denied lodging to African-Americans, Native-Americans, and other non-white persons or, in some cases, gave those patrons substandard accommodations because of race, in violation of 42 U.S.C. § 1981 and the Civil Rights Act of 1964 at 42 U.S.C. § 2000(a). Plaintiffs sought, on behalf of themselves and other customers who had been discriminated against, injunctive relief and money damages. Similar to the plaintiffs in this case, the Jackson plaintiffs argued that the issue common to the claims of all the named plaintiffs and all putative class members was whether Motel 6 had a practice or policy of discriminating against patrons and employees on the basis of race. Unlike this case, however, the evidence

in favor of class certification in *Jackson* consisted of *anecdotal individualized accounts* of incidents of disparate treatment. Although the trial court certified the class, the Court of Appeals reversed, holding that the predominance requirement of Rule 23(b)(3) was not satisfied because the plaintiffs' claims would depend on the resolution of highly case-specific factual issues rather than the answer to the question whether Motel 6 has a practice or policy of racial discrimination.

> [P]laintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination. The issues that must be addressed include not only whether a particular plaintiff was denied a room or was rented a substandard room, but also whether there were any rooms vacant when that plaintiff inquired; whether the plaintiff had reservations; whether unclean rooms were rented to the plaintiff for reasons having nothing to do with the plaintiff's race; whether the plaintiff, at the time that he requested a room, exhibited any non-racial characteristics legitimately counseling against renting him a room; and so on . . . These issues are clearly predominant over the only issue arguably common to the class — whether Motel 6 has a practice or policy of racial discrimination.

Id. at 1006.

The named plaintiffs in this case draw a comparison between the manner in which the alleged discrimination was

carried out in *Motel 6* and the manner in which Avis employed and documented its "Yeshiva" policy. The racial discrimination in *Motel 6* involved numerous separate acts of wrongdoing allegedly orchestrated by the desk clerks at individual Motel 6 locations. There was no evidence "bridging" or linking the allegations of discrimination by the managers of the individual motels to the policies and procedures of Motel 6. Quoting *Falcon*, the Eleventh Circuit noted that "[c]onceptually, there is a wide gap between (a) an individual's claim that he has been discriminated against on the basis of race, and his otherwise unsupported allegation that the defendant has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claims will share common questions of law or fact." *Id.* at 1004 (brackets omitted). Because there was no significant proof of a company-wide discriminatory policy, the plaintiffs in *Motel 6* could not "bridge the gap" and the case broke down into "an unmanageable variety of legal and factual issues." *See Falcon*, 457 U.S. at 159 n.15.

As discussed previously in the sections addressing commonality and typicality, the case against Avis is not dependent on anecdotal evidence of individual class members. It is undisputed that Avis employed a "Yeshiva" policy and that the "Yeshiva" policy emanated from its World Reservations Center. The allegations of discrimination here are based on a documented company policy written by upper management at Avis's World Reservations Center, distributed to its employees by upper management at Avis's World Reservations Center, and monitored by upper management at Avis's World Reservations Center. The proof

offered is reliable for certification purposes. *See Davis v. Northside Realty Assoc., Inc.*, 95 F.R.D. at 45, 46 (where proof of liability can be made in a general way, certification is proper, so long as general proof is reliable). Unlike *Jackson*, the resolution of the "overarching" single common issue does not break down into an unmanageable variety of individual legal and factual issues. *Compare Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996). To paraphrase *Jackson*, most if not all of plaintiffs' claims will stand or fall on the question whether Avis has adopted and applied such a centralized policy and practice of ethnic and religious discrimination, and not on the resolution of the highly case-specific factual issues alluded to by Avis in its briefs and oral argument before the court.[9] This critical common element satisfies the standard set forth in *Jackson*, 130 F.3d at 1006 n.13.[10]

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9. The Eleventh Circuit in *Jackson*, after enumerating the distinctly case-specific inquires into the facts surrounding each alleged incident of discrimination, stated, "These issues are clearly predominant over the only issue arguably common to the class — whether Motel 6 has a practice or policy of racial discrimination. Indeed, we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question of whether Motel 6 has a practice or policy of racial discrimination, but on the resolution of these highly case-specific factual issues." *Jackson*, 130 F.3d at 1006.

10. In *Jackson*, the question of whether Motel 6 has a practice or policy of racial discrimination was determined to be "irrelevant" to all or nearly all of the plaintiffs' claims. Because Motel 6 employees had general authority to rent motel rooms, the cases were expected to focus on highly case-specific factual inquires to establish

(Cont'd)

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That fact questions unique to each individual class member may remain after the predominant common question has been resolved does not defeat predominance. *Medicare Beneficiaries Defense Fund v. Empire Blue Shield*, 938 F.Supp. 1131 (D.C.N.Y. 1996) (Rule 23(b)(3) commonality requirement met even though individual issues existed such as nature of oral misrepresentations to individual member, individual's knowledge of misrepresentations, and individual member's reliance on misrepresentations); *Arenson v. Whitehall Convalescent & Nursing Home*, 164 F.R.D. 659, 664 (D. Ill. 1996) (fact that oral misrepresentations were made to plaintiffs does not preclude finding that common issues predominate where misrepresentations also appear in written documents); *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992) (certification of limited number of issues made class action maintainable despite presence of numerous individual issues); *Simer v. Rios*, 661 F.2d 655, 674 (7th Cir. 1981) ("The use of separate trials on individual

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(Cont'd)
or controvert the issue of whether a Motel 6 employee denied each plaintiff a room, or rented him a substandard room, on the basis of race. 130 F.3d at 1006 n.13. Perhaps the result in *Jackson* would have been different if the plaintiffs there had documented evidence and testimony from central Motel 6 management that in fact the company had a policy to (1) refuse to rent otherwise vacant rooms to blacks and other white persons, (2) decided to segregate black patrons and other non-white patrons within a single facility, and (3) decided to provide substandard housekeeping and other services to black patrons and other non-white patrons as compared to white patrons. *See* 130 F.3d at 1001. Because of the lack of such evidence, the existence of a policy had to be established by highly case-specific claims of "dozens or hundreds of plaintiffs from around the country" which the court concluded was "undesirable." *Id.* at 1005 n.10.

issues of fact should not be an absolute bar to the use of the class action device"); *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683 (D. Ga. 1983) (existence of individual questions concerning class members does not defeat certification; the rule requires only that common questions predominate, not that they be unanimous); *Wofson v. Artisans Sav. Bank*, 83 F.R.D. 547 (D. Del. 1979) (that some individual questions need to be litigated does not preclude finding that common issues will predominate).[11] Moreover, numerous cases have held that the existence of separate issues concerning damages sustained by individual members will not prevent a common issue of liability from being adjudicated on a class-wide basis. *See, e.g., Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 122 F.R.D. 177, 182 (E.D. Pa. 1988) ("While the court may have to take aim at the individual amounts charged each class member for the purposes of damage calculations, such a determination should not preclude class certification when common issues which determine liability predominate."); *De La Fuente v. Stokely-Van Camp Inc.*, 713 F.2d 225, 229 (7th Cir. 1983) (class manageable even though damages would be calculated separately for each member); *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727, 735 (N.D. Ill. 1977) ("Even if the damage determinations have to be made on an individual basis, this should not militate against class certification").

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11. There are no "fifty state law" questions in this case. *Compare Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Andrews v. American Tel. & Tel. Corp.*, 95 F.3d 1014. This is not a personal injury case in which individual class members might be expected to have strong interests in pursuing individual claims. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

Typically, the existence of illegal discrimination is viewed as having overriding significance which predominates over individual issues. 7A Wright & Miller, *supra*, § 1778 at 534 *citing Gill v. Monroe County Dep't Social Servs.*, 79 F.R.D. 316 (W.D.N.Y. 1978) (fact patterns underlying each class member's employment discrimination claim can vary provided that the members of the class have suffered the same or similar grievances); *Bennett v. Gravelle*, 323 F.Supp. 203, 219 (D. Md. 1971); *Gerstle v. Continental Airlines, Inc.*, 50 F.R.D. 213, 219 (D. Colo. 1970) ("The claims of all members of the class can succeed only if a Title VII violation is found, and if no such violation is found all claims will fail.").

B. Superiority.

Rule 23(b)(3) also requires that the class action be superior to other methods of litigation. Superiority is determined by comparing the efficiency and fairness of all available methods of adjudicating the matter. *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 529 (M.D. Ala.). One factor courts look at in making this determination is the size of the proposed class. An action involving a large class is likely to take the place of many separate lawsuits hence judicial economy is served by granting class certification where potentially a large number of plaintiffs are involved. *See In re Amerifirst Sec. Litig.*, 139 F.R.D. 423 (S.D. Fla. 1991). In determining superiority, courts also consider the anticipated amount of recovery for each plaintiff. Class actions are particularly appropriate where multiple lawsuits would not be justified because of the small amount of money sought by the individual plaintiffs. See Advisory Committee Note to 1996 Amendment to Rule 23.

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In addition, Rule 23(b)(3) includes a list of four factors to help courts determine whether class treatment is superior. These factors include: (A) the interests of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. Fed.R.Civ.P. 23(b)(3).

In the case against Avis, these factors weigh in favor of class certification. Because the size of the anticipated recovery for each plaintiff is small, individual plaintiffs would have little incentive to pursue their own lawsuits. *See Anderson v. Bank of the South, N.A.*, 118 F.R.D. 136, 150 (M.D. Fla. 1987) (amount of investment insufficient to justify individual actions). The fact that so few putative class members have filed individual lawsuits suggests that the members are not interested in controlling their own litigation. *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 337 (S.D. Fla. 1996). Furthermore, the wide geographical dispersion of putative class members makes concentration in one district more efficient. *See Kilgo v. Bowman Transport., Inc.*, 789 F.2d 859 (11th Cir. 1986); *Riordan v. Smith Barney*, 113 F.R.D. 60, 66 (N.D. Ill. 1986).

Finally, the court disagrees with Avis's argument that the class would be unmanageable. Issues of class action manageability encompass the "whole range of practical problems that may render the class action format

inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, 94 S.Ct. 2140, 2146, 40 L.Ed.2d 732 (1974). But mere speculation as to the manageability of a class is insufficient to preclude certification. *See Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 363 (S.D. Ga. 1996) (A finding of unmanageability requires more than the case will be difficult to try or that the case involves novel challenges). Moreover, there is a strong presumption against denying class certification for management reasons. *In re South Central States Bakery Prod. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La. 1980); Newberg, *Class Actions* § 5.53. At this stage of the proceedings, it appears to the court that a class action is a more fair and efficient method of adjudicating this lawsuit than multiple separate trials.[12]

Rule 23(c)(2) provides that individual notice must be given to all members of the class who are identified through reasonable effort if a class is certified under (b)(3). Each member must be advised that he has a right to be excluded from the class and informed that a judgement will bind all members who do not request exclusion. By subsequent order, the court will address all issues related to notice in this class action.

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12. This court will bifurcate the liability aspects of the trial; first determining liability issues common to the class, that is, whether a policy and practice of illegal discrimination exists. Only if a policy and practice of discrimination is found will the court determine discrete liability issues.

Appendix B

V. CONCLUSION

For the reasons stated above, the plaintiffs have satisfied the requirements of Rule 23. Accordingly, their motion for class certification is granted. This action may proceed as a class under subsection (b)(3).[13] Nonetheless, decertification may be appropriate if, after sufficient discovery, the plaintiffs fail to identify an adequate number of persons to satisfy the numerosity requirement, or the class becomes unmanageable or inappropriate for any other reason.

In reaching its decision, the court has construed *Jackson*'s consideration of the predominance issue as narrowly limited to the facts involved in that case. This court concludes that Jackson does not set forth any bright line test precluding a finding of predominance in class actions based on disparate religious or other discriminatory treatment, but rather applies a far more demanding standard than Rule 23(a) commonality requirements where all or almost all of the proof of the disparate claims may be derived from highly case-specific inquires. *Jackson* leaves unaddressed those situations where there is a documented company policy of discrimination written by upper management, distributed to its employees by upper management, and monitored by upper management at the company's headquarters. Still, the court acknowledges that its interpretation of *Jackson* could well be incorrect and, therefore opines, pursuant to Federal Rule

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13. If it is determined on appeal that certification under Rule 23(b)(3) is not appropriate, the court finds that this case can be certified under Rule 23(b)(2) without the claims for money damages. Pursuant to 42 U.S.C. § 1988, the plaintiffs are entitled to attorney's fees if they prevail.

of Civil Procedure 23(f) as recently amended,[14] that an interlocutory appeal from this order may materially advance the ultimate termination of the litigation.

DONE AND ORDERED in Chambers at Miami, Florida, this 8 day of February, 1999.

s/ Alan S. Gold
ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

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14. Fed.R.Civ.P. 23(f) has been amended, effective December 1, 1998, to incorporate a permissive interlocutory appeal provision. According to the Committee Note, new subdivision (f) departs from 28 U.S.C. § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court "can assist the parties and court of appeals by offering advice on the desirability of appeal." Second, it does not include the potential limiting requirement of § 1292(b) that the district court order involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 10, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-10782-GG

ZEIREI AGUDATH ISRAEL BOOKSTORE,
LEVI SUFRIN,

Plaintiffs-Appellees,

versus

AVIS RENT-A-CAR SYSTEMS, INC., a Delaware corporation authorized to do business in the State of Florida,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT, Circuit Judge, RONEY and FAY, Senior Circuit Judges.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D — STATUTE AND RULE INVOLVED

42 U.S.C. § 1981

§ 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

* * *

Fed. R. Civ. P. 23

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative

parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the

members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make

appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * *

(2)

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No. 00-788

IN THE

Supreme Court of the United States

ZEIREI AGUDATH ISRAEL and LEVI SUFRIN,
on behalf of themselves and all others similarly situated,

Petitioners,

v.

AVIS RENT A CAR SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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38 pp

PARTIES TO THE PROCEEDINGS

The plaintiffs-petitioners are Zeirei Agudath Israel and Levi Sufrin. The defendant-respondent is Avis Rent A Car System, Inc.

The original named plaintiff in this action was David Rutstein. The district court disqualified Rutstein as class representative after he twice failed to appear for his court-ordered deposition, and after Avis produced evidence that his claim was entirely fraudulent.

STATEMENT PURSUANT TO RULE 29.6

Cendant Corporation owns more than 10 percent of Avis Rent A Car System, Inc. No other publicly held entity owns 10 percent or more of the company's stock, and there is no parent company.

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Respondent Avis Rent A Car System, Inc. ("Avis") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by plaintiffs Zeirei Agudath Israel ("Z.A.I.") and Levi Sufrin. As set forth below, the petition should be denied because the decision of the Court of Appeals for the Eleventh Circuit does not conflict with this Court's holding in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), or *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), does not create a split among the Courts of Appeals, and does not raise any issues of great national importance, but rather involves the routine application of Rule 23 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

I. District Court Proceedings Prior to Certification

A. The Original Plaintiff

This action was originally filed in the United States District Court for the Southern District of Florida as an individual action by David Rutstein pursuant to 42 U.S.C. § 1981. (R I-1)[1] Rutstein subsequently amended his complaint to assert class claims on behalf of more than 10,000 "Jewish-owned businesses and Jewish individuals." (R I-2 ¶¶ 3, 6)

In the amended complaint, Rutstein claimed to own a "Rutstein Insurance Agency" and that in early 1993, he called Avis's telesales department in Tulsa, Oklahoma to apply for an

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[1] Citations to "R" and "Supp. R" refer to the volume number of the original record, the document number within each volume, and, where applicable, either the exhibit or tab number and/or the page number within the document.

Avis corporate account.[2] (R I-2 ¶ 18) According to Rutstein, his application was denied because Avis's telesales department allegedly had a "yeshiva" policy pursuant to which callers who had a "Jewish-sounding" name were denied corporate accounts. (*Id.* ¶¶ 3, 8) Rutstein sought to represent a class consisting of all Jewish individuals and businesses "who were rejected the right to do business with AVIS due to their race, ancestry and ethnic characteristics." (*Id.* ¶ 19)[3]

Rutstein moved for class certification on August 4, 1997. The district court subsequently entered a scheduling order for discovery on class certification issues and briefing on the motion.

B. Rutstein's Failure to Appear for Court-Ordered Depositions

After taking several depositions of Avis's employees, Rutstein failed to appear for his own court-ordered deposition.

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[2] The benefits of an Avis corporate account include discounted rental rates, free rentals, and a cap on exposure to damages. (Supp. R II-102 Tab 2 at 55) The basic requirements to qualify for the account are that the business be legitimate and have a need to rent cars for business purposes at least 12 to 18 times a year. (*Id.* Tab 2 at 19-20 & Tab 5 at 18)

[3] Avis categorically denies that it discriminated against Jewish-owned businesses. The Anti-Defamation League of B'nai B'rith stated publicly that it believes Avis does not have a policy of prejudice against Orthodox Jews. (*See* James T. Madore, *ADL Backs Avis in Bias Charge: Group sees no proof of prejudice in policies*, Newsday, March 7, 1997, Supp. R IX-194 Ex. A)

(R III-92 Ex. O) Avis moved for sanctions, including dismissal of the action, pursuant to Fed. R. Civ. P. 37. In opposing the motion, plaintiffs' counsel did not defend their client's non-appearance at his deposition. Instead, they urged the district court not to dismiss the action so as to allow intervention by additional (yet to be identified) plaintiffs. (R IV-101)

The district court awarded Avis costs and attorneys' fees, and again ordered Rutstein to appear for his deposition. (R V-126) Again, however, Rutstein refused. Accordingly, Avis renewed its Rule 37 motion to dismiss. (R V-130)

C. Avis Opposes Rutstein's Class Certification Motion and Z.A.I. Moves to Intervene

In opposition to Rutstein's class certification motion, Avis challenged Rutstein's adequacy to serve as class representative based on his refusal to appear for two court-ordered depositions, and submitted evidence showing that Rutstein had a criminal record and that he never owned or operated a "Rutstein Insurance Agency" which he claimed Avis discriminated against. (Supp. R II-103 Exs. A, B, N, O & Q) Avis further opposed class certification based on Rutstein's failure to satisfy any of the requirements of Fed. R. Civ. P. 23.

In their reply, plaintiffs' counsel did not dispute any of Avis's evidence demonstrating that Rutstein's complaint was a complete sham. Instead, they stated that a motion to intervene would be filed (by still unidentified intervenors) to remedy Rutstein's inadequacies.

On December 5, 1997 -- more than eight months after Rutstein filed his sham complaint and five weeks after the close of class certification discovery -- Z.A.I. filed its motion for intervention. (R IV-111) Avis opposed the motion based on

the well-established principle that, where the original plaintiff lacked standing, there is no justiciable case into which a third party can intervene. (R V-121 at 8-10) Avis also opposed the motion on grounds that it was untimely under the court's scheduling order. (*Id.* at 11-15)

D. Avis Moves for Summary Judgment

Based on the same evidence showing that Rutstein never had a claim against Avis, Avis also moved for summary judgment for lack of standing. (R IV-119, 120) In the alternative, Avis sought dismissal for failure to prosecute under Fed. R. Civ. P. 41(b) and the Court's inherent power based on Rutstein's abandonment of the case. (*Id.*)

In their opposition to Avis's summary judgment motion, plaintiffs' counsel again did not dispute any of the evidence showing that Rutstein's claim against Avis was a fraud. Instead, they argued that the district court should allow for the substitution of Z.A.I. as named plaintiff rather than dismiss the action. (Supp. R IV-133 at 7-8)

At a subsequent omnibus hearing on all pending motions, plaintiffs' counsel conceded that Rutstein was not an adequate class representative and that he had "effectively withdrawn his appearance in this case." (Pet. App. at 8a; R VIII-150 at 4, 9)

E. The *Sufrin* Action

On February 24, 1998, more than three weeks after the omnibus hearing, Sufrin filed a separate action pursuant to 42 U.S.C. § 1981 on his own behalf and as a representative of a putative class. (Supp. R X-1) He alleged that Avis had cancelled his corporate account, which he purportedly held as

an employee of the Chabad of Margate, because he is Jewish. (*Id.* ¶¶ 21, 22) According to his complaint, Sufrin lived in Florida, but the events underlying his complaint allegedly took place in Oklahoma and New York. (*Id.* ¶¶ 4, 14-27)

On March 18, 1998, shortly after Avis answered Sufrin's complaint (Supp. R X-9), Sufrin moved to consolidate his case with the *Rutstein* action. (R VI-159) On March 23, 1998, well before the time expired for Avis to file its opposition to Sufrin's consolidation motion, the district court summarily granted that motion. (R VII-225) Avis filed a motion for reconsideration (Supp. R X-11), which the district court also summarily denied. (Supp. R X-15)

F. The District Court's Omnibus Order

On March 25, 1998, the district court issued an Omnibus Order. Among other things, the district court permitted Z.A.I. to intervene in the *Rutstein* case and granted leave for the filing of the intervenor's complaint, which it acknowledged "substitutes [Z.A.I.] for Rutstein and revises the composition of the proposed class." (R VI-162 at 4) The district court found Z.A.I.'s motion for intervention to be timely by bootstrapping it to the order it issued just two days earlier granting Sufrin's motion to consolidate his action with the *Rutstein* action, stating: "Under the circumstances, intervention will neither complicate the case nor cause undue delay as discovery in the two cases can proceed concurrently." (*Id.* at 3)

Finding that Avis had presented "substantial and convincing evidence showing that David Rutstein is not an adequate class representative," the district court denied class certification on that ground (without reaching the other grounds advanced by Avis). (*Id.* at 5) The denial of class certification, however, was without prejudice to refiling it after additional

discovery had been conducted concerning the typicality and adequacy of Z.A.I. to serve as class representative. (*Id.*)

Finally, the district court denied Avis's motion for summary judgment for lack of standing, holding that "material issues of fact exist regarding Rutstein's business ownership and alleged injury" even though plaintiffs' counsel never disputed the evidence submitted by Avis on the issue. (*Id.* at 6) In addition, despite acknowledging that Rutstein had failed to abide by court orders directing discovery and had failed to prosecute the case, the district court denied Avis's renewed motions to dismiss under Rules 37 and 41(b) because it had granted intervention by Z.A.I. who "may step into Rutstein's shoes for purposes of prosecuting this lawsuit." (*Id.*)[4]

In a subsequent Order, dated May 5, 1998, the district court granted a motion filed by Sufrin to intervene in this action. (R VI-167)

II. The Record Evidence

A. The Testimony of Avis's Employees

Plaintiffs' counsel took the depositions of five Avis employees in Tulsa, all of whom testified unequivocally that Avis's telesales representatives were never instructed to treat

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[4] Avis had also moved pursuant to 28 U.S.C. § 1404(a) to transfer both the *Rutstein* action and the *Sufrin* action to the Northern District of Oklahoma, where all the operative events underlying their claims occurred, where most of the witnesses reside, and where most of Avis's records relevant to this action are located. (R II-56; Supp. R X-8) As part of the Omnibus Order, the district court summarily denied these motions. (R VI-162 at 2-3)

any business differently because it was Jewish-owned or had a Jewish-sounding name. The Avis employees acknowledged that the term "yeshiva" was used in Avis's telesales department, but they made it clear that the term referred to underage individuals -- regardless of race or religion -- who sought to circumvent the age 25 restriction for renting cars by setting up illegitimate corporate accounts.[5] According to Avis's employees, the term "yeshiva" was used in Avis's telesales department to refer to underage callers because when the problem first surfaced in the late 1980's and early 1990's, the callers would identify themselves over the telephone as being affiliated with yeshiva institutions. (Supp. R IX-194 Ex. L)

B. The Z.A.I. and Sufrin Complaints

Z.A.I. and Sufrin's complaints sought to change the nature of Rutstein's original claim and to expand the putative class to include:

> All Jewish individuals and Jewish-owned businesses who, subsequent to January 1, 1990, have attempted to contract, have contracted, or will in the future contract with AVIS to open an account for use in their business, and *who were refused an account, had their account canceled, or were given a less advantageous account*

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[5] With certain narrow exceptions and as permitted by state law, Avis has always had a policy that required renters to be at least 25 years of age. One exception applies to companies with a corporate account if it includes a waiver of the minimum age requirement. (Supp. R IX-194 Ex. E ¶ 4)

> because of their religion, ancestry, and/or ethnicity.[6]

(R V-154 ¶ 7) (Emphasis added.)

Despite this expanded class definition, Z.A.I. and Sufrin have identified no Jewish individuals or businesses, other than themselves, that claim to have been discriminated against by Avis's telesales department. Moreover, the record shows that the two plaintiffs are each asserting a claim presenting unique factual circumstances.

1. Z.A.I.

Z.A.I. is a bookstore located in the premises of Teleshe Yeshiva, an Orthodox Jewish school in Chicago, and is represented in this action by Joshua Borenstein, a student at Teleshe Yeshiva who purportedly manages the bookstore on a part-time basis. (Supp. R IX-194 Ex. I at 4, 11-12) Borenstein was 23 years old at the time relevant to this action. (*Id.* Ex. G)

Z.A.I.'s complaint alleges that in early 1995, Borenstein applied for an Avis corporate account in the name of "Zeirei Agudath Israel," but was allegedly turned down "because of its obviously Jewish sounding name." (R V-154 ¶ 21) According to the complaint, Borenstein applied again for an Avis corporate account in January 1996 using the name Z.A.I. Bookstore. The application was accepted allegedly because Avis's telesales representatives "did not recognize Z.A.I. as a Jewish sounding name." (*Id.* ¶ 22) The complaint alleges that in May 1996,

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[6] Z.A.I. and Sufrin added a claim for religious discrimination which was not present in Rutstein's complaint. On its face, 42 U.S.C. § 1981 does not cover religious discrimination.

Borenstein received a "perplexing" letter from Avis canceling Z.A.I.'s corporate account. (*Id.* ¶ 24)

On its face, the "perplexing" letter from Avis referred to in Z.A.I.'s complaint makes it clear that Avis had valid nondiscriminatory reasons for canceling Z.A.I.'s corporate account. The letter advised Borenstein that Z.A.I.'s corporate account was being cancelled because it had too little rental activity and that too much of the rental activity appeared to be from renters under the age of 25. Significantly, the letter closed by stating: "If you find that your company's rental needs increase significantly and you have a preponderance of renters over the age of 25, please do not hesitate to consider Avis as your car rental supplier." (Supp. R IX-194 Ex. F)

At his deposition, Borenstein admitted that at the times relevant to this lawsuit, Z.A.I.'s only employees were himself and two part-time student volunteers, both of whom were between the ages of 18 to 20. (*Id.* Ex. I at 12-13, 41-42) When asked what the basis was for his belief that he was discriminated against by Avis, Borenstein testified, "I'm referring to Yeshiva world rumors where it was taken on as a simple fact of life that these that [sic] problems did arise. . . And then when something happened to me, the logical assumption and feeling is going to be that this is the reason." (*Id.* at 212)

Significantly, Borenstein acknowledged that the problems he referred to were experienced by yeshiva students under the age of 25 attempting to rent Avis cars, and not Jewish-owned businesses in general (*id.* at 201), stating: "It was a suspicion that as soon as the word "Yeshiva" was in there or as soon as something regarding the Yeshiva they [Avis] would catch on that *it was students then it was time to look for the next corporate account.*" (*Id.* at 203) (Emphasis added.)

2. Sufrin

Sufrin's complaint states that he held an Avis corporate account as an employee of the Chabad of Margate and that in March 1996, he attempted to rent a car at an Avis counter in Newark Airport using his Avis corporate account. (Supp. R X-1 ¶¶ 5, 22) Sufrin alleges that he was refused a rental car when he could not produce a company identification. One week later, he allegedly received a "perplexing letter from AVIS advising that his account at AVIS had been terminated and his privileges revoked." (*Id.* ¶ 22) Sufrin, however, has produced no evidence showing that he ever held an Avis corporate account, and Avis has no record of such an account.

Sufrin, who was a 21-year-old student at the time relevant to his complaint, testified at his deposition that he was able to rent cars from Avis on numerous occasions beginning at the age of 18 by using a corporate account. (Supp. R IX-194 Ex. B at 80-83, 90-97) The record shows, however, that in April 1996, Sufrin was placed by Avis in its Name Risk File, thereby terminating his *individual* rental privileges, after it was determined that a corporate account being used by Sufrin belonged to U.S. Life, a company with which he had no affiliation.[7] (*Id.* Ex. D) At his deposition, Sufrin conceded that the "puzzling letter" referred to in his complaint was a notification from Avis that he would no longer be allowed to rent cars from Avis. (*Id.* Ex. B at 124-26)

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[7] Seth Kaminsky, the head of Avis's security department, submitted an affidavit to the district court stating that the Risk File, or "Do Not Rent" list, identifies *individuals* who are not permitted to rent cars from Avis because of a violation of the rental agreement, including unauthorized rental under the age of 25. (Supp. R IX-194 Ex. E ¶¶ 3-4)

At his deposition, Sufrin made it clear that his claim that he was discriminated against by Avis is premised only on the termination of his individual rental privileges as a result of the Newark Airport incident -- and not, as alleged in his complaint, on the cancellation of a corporate account by Avis's telesales department in Tulsa. (*Id.* at 112-17) When asked at his deposition what his basis was for alleging that Avis has a policy of discrimination, he stated: "Well, I knew that in *certain locations* that when you go to rent cars there was a good chance they would cut you off. . . . The cut off is that if I went to rent a car in certain places which were highly populated with Jewish people, that *they would find a reason to revoke your renting privileges.*" (*Id.* at 155) (Emphasis added.) According to Sufrin, he believes he was discriminated against at the Avis rental counter in Newark Airport not because he is Jewish, but because he is an Orthodox Jew. (*Id.* at 205-07)

C. The Solicitation of Plaintiffs

Plaintiffs' allegations against Avis have been widely publicized throughout the country (Supp. R IX-194 Ex. X), and their counsel have placed advertisements in publications both in Florida and in Israel soliciting potential class members. (*Id.* Ex. Y) Moreover, immediately after filing the original complaint in this action, plaintiffs' counsel appeared before the New York State Assembly to testify about the unproven allegations in the complaint. (*Id.* Ex. V at 33, 37) Despite this calculated publicity, no class members other than the discredited Rutstein and the two plaintiffs have appeared.

Even Sufrin and Z.A.I. did not come forward on their own. Their names appeared in documents produced by Avis to Rutstein, the original phantom plaintiff, in an action that was improper from its inception. Exploiting this ill-gotten discovery, the record shows that plaintiffs' counsel contacted both by

telephone to solicit them to become named plaintiffs. (*Id.* Ex. B at 204-05; Ex. I at 99-100, 105-08, 110-112)

D. The Testimony of Plaintiffs' Witnesses

In support of their claim that Avis has a policy of discriminating against Jewish-owned businesses, plaintiffs' counsel produced the transcript of a "sworn examination" of William Ward (Supp. R IX-194 Ex. N), a former Avis employee who worked in the telesales department for 17 months and was terminated for dishonesty. (*Id.* Ex. O at 28, 150-51)

The record shows that Ward's use of the term "yeshiva" did not just refer to Jewish businesses. Ward admitted at his deposition that any applicant for a corporate account -- whether the name was Jewish-sounding or not -- would be classified as a "yeshiva" if it was not listed with directory assistance or Dun & Bradstreet and that "yeshiva just became a slang term used for somebody who was going to damage Avis cars or even possibly defraud Avis." (*Id.* Ex. O at 95-96, 53) Notably, Ward alleged no discrimination by Avis concerning the *cancellation* of corporate accounts or the revocation of individual rental privileges.

In addition to Ward's testimony, the district court also relied on an *ex parte* sworn statement from Elaine Rodgers, another former Avis employee. Rodgers, however, testified that the alleged "yeshiva" policy related only to *existing* corporate account holders exclusively from the New York area who were seeking to lower Avis's minimum age requirement for renting cars:

> Q: From a customer service standpoint, if it was determined that the customer was a

Yeshiva, was there any financial restriction placed on the account?

A: No, not that I'm – that I was aware of. *They were just denied the minimum age benefit.*

. . . .

Q: Do you have any knowledge if this practice was enforced in other parts of the country where there are large Jewish populations?

A: Not to my knowledge. It was mainly – well, *all of it was in the New York area, if they were from New York.*

. . . .

Q: Once an account representative believed that a person was a Yeshiva, how was this policy of discrimination enforced by the company?

. . . .

A: Okay. *They would not get the minimum age reduction.*

(Supp. R IX-194 Ex. V at 7-12) (Emphasis added.)

III. The District Court's Class Certification Order

Plaintiffs filed a renewed motion for class certification in July 1998. (Supp. R VIII-182, 183, 184) Avis opposed this motion primarily on the ground that, under the controlling authority of *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d

999 (11th Cir. 1997), the individualized inquiry required to resolve each class member's claim of disparate treatment precluded certification of the class. Avis also opposed the motion on other, equally compelling, grounds, including: (i) neither Sufrin nor Z.A.I. was an adequate class representative because both were subject to unique defenses, (ii) the absence of any evidence of an aggrieved class precluded a finding of numerosity, commonality and typicality required under Fed. R. Civ. P. 23(a), and (iii) certification under Rule 23(b)(2) was inappropriate because the primary form of relief sought was money damages.

Following a hearing, the district court granted class certification. (Pet. App. B) In its order, the district court acknowledged that both Sufrin and Z.A.I. are subject to unique defenses. *(Id.* at 49a-51a) Nonetheless, and in plain derogation of well-established precedent, the district court determined that Z.A.I. and Sufrin were adequate class representatives, stating the existence of the unique defenses was not an appropriate area of inquiry on a class certification motion. *(Id.)*

The district court also acknowledged that notwithstanding their claims to represent a class of thousands, the two named plaintiffs had failed to identify even one other person who claimed to have been victimized by Avis's alleged policy of discrimination. (Pet. at 42a) Nonetheless, the district court made a conditional finding that plaintiffs had satisfied Rule 23(a)'s numerosity requirement. *(Id.)* The district court also found that plaintiffs satisfied the commonality and typicality requirements of Rule 23(a) based on their allegation that Avis had a policy of discrimination.

Turning to the requirements of Rule 23(b), the district court correctly held that certification under Rule 23(b)(2) was not appropriate because plaintiffs' claims for compensatory and

punitive damages predominated over their claim for injunctive relief. (Pet. at 52a-57a) Plaintiffs did not challenge this ruling before the Eleventh Circuit and have not raised it in their petition.

The district court did, however, grant certification pursuant to Rule 23(b)(3). In doing so, the district court recognized that in *Jackson*, the Eleventh Circuit held that Rule 23(b)(3)'s predominance requirement was not satisfied where the only issue common to the putative class was whether the defendant had a general policy of discrimination. Nonetheless, the district court held that *Jackson* was "narrowly limited to the facts involved in that case," and that plaintiffs here had produced greater evidence of a nationwide policy of discrimination than had the *Jackson* plaintiffs. (Pet. at 68a)

Although the district court distinguished *Jackson*, it recognized that class certification would create numerous difficulties in terms of managing the litigation. Thus, without the benefit of briefing or oral argument, the district court *sua sponte* declared: "This court will bifurcate the liability aspects of the trial; first determining liability issues common to the class, that is, whether a policy and practice of illegal discrimination exists. Only if a policy and practice of discrimination is found will the court determine discrete liability issues." (Pet. at 67a n.12)

Significantly, the district court concluded its order by explaining that its interpretation of *Jackson* "could well be incorrect," and opining that an interlocutory appeal was therefore appropriate. (Pet. at 68a-69a) In the same breath, the district court stated that in the event its Rule 23(b)(3) ruling was reversed on appeal, it would order certification under Rule 23(b)(2) "without the claims for money damages." (Pet. at 68a n. 13) The district court recrafted the complaint for purposes of

Rule 23(b)(2) despite the fact that plaintiffs had never expressed any intention to abandon their claims for money damages.

IV. The Eleventh Circuit's Decision Reversing Class Certification

The Court of Appeals for the Eleventh Circuit granted Avis leave to appeal pursuant to Fed. R. Civ. P. 23(f).

In a thorough and well-reasoned decision, the Court of Appeals reversed the district court's grant of class certification. Relying on *Jackson* as binding precedent, the Court of Appeals held that plaintiffs' could not satisfy Rule 23(b)(3) because the single common issue of whether Avis had a policy of discrimination could not predominate over the myriad individualized issues presented by plaintiffs' disparate treatment claims. (*Id.* at 15a-19a)

The Court of Appeals rejected *amici's* argument that *Teamsters* compelled a finding that the issue of whether Avis had a policy of discrimination predominated over individualized issues. It gave two reasons: (i) the *Teamsters* rationale is particularly appropriate in employment discrimination cases, and (ii) the relief to which the plaintiffs in *Teamsters* were entitled after a finding of a pattern or practice of discrimination was equitable in nature. (Pet. at 26a) The Court of Appeals concluded: "The Teamsters framework is, therefore, inappropriate *in the instant* case because the establishment of a policy or practice of discrimination cannot trigger the defendant's liability for damages to all the plaintiffs in the putative class. (Pet. at 27a) (Emphasis added.)

REASONS FOR DENYING THE WRIT

Like medieval alchemists struggling to turn lead into gold, petitioners attempt in vain to turn the opinion below into something it is not: a case about the burden-shifting approaches of *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). In reality, the Eleventh Circuit's decision did not turn on the applicability of *Teamsters* or *McDonnell Douglas* to this case. Rather, the sole issue resolved below was whether a class could properly be certified under Rule 23(b)(3) where the class members are asserting claims for disparate treatment discrimination and seeking money damages. Based on well-established authority, the Eleventh Circuit merely held that the individualized inquiry that will be required to resolve each plaintiff's claims necessarily predominates over the one issue arguably common to the class -- whether Avis had a policy of discrimination.

Against this backdrop, it becomes crystal clear that the decision below does not present an issue of public importance or create a split with other circuits. Instead, it merely involves a routine application of the requirements of Rule 23. As such, it is singularly inappropriate for certiorari review, and plaintiffs' petition should be denied.

I. The Decision Below Does Not Conflict with *Teamsters*

Under Rule 23(b)(3), a class can be certified only where (i) questions of law or fact common to the class members predominate over any individual issues and (ii) the class action is superior to other methods for the fair and efficient adjudication of the litigation. Fed. R. Civ. P. 23(b)(3). In determining whether common issues predominate over individual issues,

courts must consider the claims, defenses, relevant facts, and substantive law presented in the case. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

In their petition, plaintiffs argue that the court below erred in decertifying the class under Rule 23(b)(3) because, under this Court's decision in *Teamsters*, the question of whether Avis had a policy of discrimination "was an overriding common question and, if answered affirmatively, established a prima facie case of unlawful discrimination applicable to every class member." (Pet. at 15, 21) This argument must be rejected for two reasons: (i) *Teamsters* does not address the requirements of Rule 23; and (ii) *Teamsters* does not involve claims for money damages.

A. *Teamsters* Does Not Address Rule 23

Teamsters was an action for equitable relief brought by the government pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a). 431 U.S. at 328. This Court merely held in *Teamsters* that proof of a pattern or practice of discrimination supports the inference that any particular employment decision, during the period in which the policy was in force, was made in pursuit of that policy, and the burden then shifts to the employer to demonstrate that the individual applicant was denied employment for lawful reasons. 431 U.S. at 362.

Nothing in *Teamsters* addresses class certification under Rule 23, much less the predominance requirement of Rule 23(b)(3). Indeed, plaintiffs fail to cite a single case which has relied on the burden-shifting framework of *Teamsters* as a basis for holding that the predominance of common issues required by Rule 23(b)(3) has been satisfied.

To be sure, the Eleventh Circuit stated in *dicta* that "the Teamsters rationale is particularly appropriate in employment discrimination cases." (Pet. at 22a) Its decision to decertify the class, however, was *not* based on a distinction between employment and non-employment cases. Rather, decertification was mandated by the Eleventh Circuit's prior decision in *Jackson*.[8]

In *Jackson*, the complaint was filed under 42 U.S.C. § 1981, alleging that a motel chain had a nationwide policy of discrimination against customers on the basis of race. The district court there certified a class under Rule 23(b)(3) on the ground that "litigating the existence or non-existence of a nationwide policy of racial discrimination certainly does not call for class member-specific proof." *Jackson v. Motel 6 Multipurpose, Inc.*, 175 F.R.D. 337, 345 (M.D. Fla. 1997). The Eleventh Circuit granted a writ of mandamus and held that the district court had abused its discretion in certifying the class.

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[8] It is noteworthy that plaintiffs do not cite a single case applying *Teamsters* to non-employment discrimination cases. *Cf. Anderson v. Cornejo*, Nos. 97 C 7556, 99 C 3786, 2000 WL 286902, at *6 (N.D. Ill. March 10, 2000) (noting that plaintiffs there "do not point to any cases in which the pattern or practice method of proof has been applied outside the context of employment discrimination actions"). As discussed below, however, whether *Teamsters* is limited to the employment context would not affect application of the requirements under Rule 23(b)(3). Accordingly, this is not an issue that warrants review by this Court at this time. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959) (dismissing writ of certiorari where issue that lead to grant of certiorari "can await a day when the issue is posed less abstractly").

Jackson, 130 F.3d at 1006-07.[9] In directing the district court to decertify the class, the Eleventh Circuit squarely held that the allegation that the defendant has a nationwide policy of discrimination is not sufficient to make common issues predominate over individualized issues in an action involving disparate treatment discrimination claims:

> The *Jackson* plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination. . . . Even more variegated issues would certainly be present in the claims of hundreds or even thousands of members of an improperly certified class. Furthermore, even factual issues that are common to many of the *Jackson* plaintiffs . . . will require highly case-specific determinations at trial. These issues are clearly predominant over the only issue arguably common to the class -- whether [defendant] has a

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[9] The evidence of the alleged discriminatory policy in *Jackson* included: (i) seven former and current employees of the defendant, including a former manager, submitted affidavits attesting to the defendant's discriminatory policy; (ii) five of the former employees had filed their own class action claiming that they were forced to discriminate against the plaintiff class; and (iii) 15 class members submitted affidavits attesting to being victims of the alleged discriminatory policy. 175 F.R.D. at 342; 130 F.3d at 1002. Based on this evidence, the district court in *Jackson* determined that there was an "adequate factual basis" for the plaintiffs' allegation that the defendant had policy of discrimination, 175 F.R.D. at 343, and the Eleventh Circuit described the allegations as "serious," 130 F.3d at 1002-03 n.5.

> practice or policy of racial discrimination. Indeed, we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether [defendant] has a practice or policy of racial discrimination, but on the resolution of these highly case-specific factual issues."

130 F.3d at 1006.

Jackson has been followed by the Court of Appeals for the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), which was an employment discrimination case brought under Title VII and 42 U.S.C. § 1981. Significantly, in *Allison*, the Fifth Circuit expressly noted that the burden of proof would shift to the employer once the plaintiffs demonstrated a pattern or practice of discrimination, but nonetheless held that certification would still be improper under Rule 23(b)(3). 151 F.3d at 421. *See also Ramirez v. Decoster*, 194 F.R.D. 348, 354 (D. Me. 2000) (rejecting argument that *Teamsters* approach would permit predominance requirement of Rule 23(b)(3) to be satisfied); *Anderson*, 2000 WL 286902, at *6-*7 (even if pattern or practice of unconstitutional conduct were proven, Rule 23(b)(3) certification is improper because liability for individual class members would still need to be resolved).[10]

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[10] Numerous courts have long recognized that disparate treatment discrimination claims are generally less amenable to class certification. *See, e.g., Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570 n.10 (11th Cir. 1992); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980); *Brooks v. Circuit City Stores, Inc.*, No. DKC 95-3296, 1996 WL 406684, at *5

(continued...)

Certainly, nothing in *Teamsters* dispenses with the individualized inquiry required in a disparate treatment case. Indeed, in remanding the case to the district court for further proceedings on individual rights to relief, this Court stated:

> The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices.

431 U.S. at 371-72.

Here, plaintiffs' claim under 42 U.S.C. § 1981 -- the same statute at issue in *Jackson* and *Allison* -- requires proof of intentional discrimination and therefore can proceed only under the theory of disparate treatment. *See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389-90 & n.17 (1982). Accordingly, even if plaintiffs were to demonstrate that Avis had a policy of discrimination and thereby benefit from the *Teamsters* presumption, they still would have the burden of proving that Avis's proffered reason for each challenged conduct was a pretext for discrimination. As stated by the Eleventh Circuit:

> The individual issues that must be addressed include not only whether Avis actually denied a particular plaintiff a corporate account, gave the

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[10] (...continued)
(D. Md. June 17, 1996); *Gorence v. Eagle Food Centers, Inc.*, No. 93 C 4862, 1994 WL 445149, at *9-*11 (N.D. Ill. Aug. 16, 1994); *Hillis v. Marsh*, No. TX-79-82-CA, 1986 WL 10617, at *27 (E.D. Tex. Feb. 20, 1986).

> plaintiff a less advantageous account, or cancelled the plaintiff's account, but also whether the particular plaintiff was of the age required by Avis to qualify for a corporate account, whether the plaintiff met the financial criteria for a corporate account; whether the nature of the plaintiff's expected use of Avis vehicles would make the transaction cost-justified for Avis; whether the plaintiff would be renting cars from Avis in a criminally high-risk or low-risk geographical area; whether the Avis employee who allegedly denied the plaintiff a corporate account judged the caller-applicant to be lying about his or her qualifications based on information not related to the caller's ethnicity; and so on, and so on.

(Pet. at 17a; *see also* Pet. at 18a n.15; 26a-29a)

Regardless of whether the *Teamsters* presumption applies, these individual-specific issues will need to be addressed by the trier of fact to determine Avis's ultimate liability to each individual class member. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). In fact, if plaintiffs are correct that *Teamsters* applies and class members will benefit from class-wide proof of discrimination, it will necessarily be the individualized issues that will be the focus of inquiry in determining individual relief. *See Jackson*, 130 F.2d at 1006 n.13 (because issue common to class will be "very readily satisfied . . . the cases may be expected to focus on the highly case-specific factual inquiries that will establish or controvert" claim that each plaintiff was discriminated against on basis of race).

Significantly, although the Eleventh Circuit's decision to decertify the class in this case was mandated by its prior decision in *Jackson*, plaintiffs do not argue that *Jackson* was decided incorrectly, much less cite a single case which is inconsistent with *Jackson*. Moreover, although plaintiffs discuss the district court's attempt to distinguish *Jackson* from this case (Pet. at 5), they have abandoned their argument that *Jackson* is distinguishable from this case. Indeed, there is a glaring absence of any mention of *Jackson*, or even *Allison*, in the argument section of plaintiffs' petition.

In the final analysis, plaintiffs are attempting to circumvent *Jackson* and *Allison* by seizing on the burden-shifting framework of *Teamsters* as support for their proposition that an allegation of a policy of discrimination alone is sufficient to warrant class certification. That is simply not the law. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982) ("allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified").

Under the circumstances, there is no conflict between the decision below and *Teamsters* that warrants review by this Court.

B. *Teamsters* Did Not Involve a Claim for Money Damages

A "more important" reason the Eleventh Circuit gave for distinguishing *Teamsters* was that the relief sought in that case was equitable in nature, whereas plaintiffs here are primarily seeking compensatory and punitive damages. (Pet. at 26a-29a) *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring) (noting that while injunctive relief may be appropriate once class has established that

discrimination was employer's standard practice, "as to the individual members of the class, the liability phase of the litigation is not complete"); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984) ("While a finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class."). This distinction, standing alone, precludes the finding of a conflict between *Teamsters* and the decision below.

Plaintiffs do not, and cannot, argue that their claims for compensatory damages will require individualized inquiry. Instead, they focus on their claims for punitive damages, contending that they "can easily be determined and awarded on a class wide basis." (Pet. at 26) This contention is meritless. It is well-settled that the amount of punitive damages awarded in a civil rights case must be "reasonably related" to the reprehensibility of the defendant's conduct and to the compensatory damages awarded. *Allison*, 151 F.3d at 417. *Cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-81 (1996). Accordingly, as with compensatory damages, claims for punitive damages must necessarily "focus almost entirely on facts and issues specific to individuals rather than the class as a whole," thereby detracting from the superiority of the class action device for resolving claims. *See Allison*, 151 F.3d at 419. *See also Ramirez*, 194 F.R.D. at 354 (even if *Teamsters* framework enabled common issues to predominate, class action still would not be superior for adjudicating claims because same jury from liability stage would need to make individualized determinations to establish compensatory and punitive damages); *Gorence v. Eagle Food Ctrs., Inc.*, No. 93 C 4862, 1994 WL 445149, at *11 (N.D. Ill. Aug. 16, 1994) (holding that class action would neither be efficient nor economical because court "would be forced to hold a series of mini-trials to determine

whether each class member suffered discrimination, as well as individualized damages").[11]

Equally unavailing is plaintiffs' contention that the Eleventh Circuit ignored their request for equitable relief. (Pet. at 24) If anything, this argument is relevant only to certification under Rule 23(b)(2), which allows for certification if the relief sought is primarily injunctive or declaratory. The propriety of Rule 23(b)(2) certification in this case, however, is not one of the issues raised by plaintiffs in their petition.

In any event, as the district court concluded, the equitable relief plaintiffs sought was subsidiary to their request for money damages. (Pet. at 52a-57a) Plaintiffs did not, and could not, challenge that conclusion before the Eleventh Circuit, and thus their effort to challenge it now is not properly

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[11] Plaintiffs cite one district court case from Idaho for the proposition that the issue of punitive damages is common to the class for the purposes of meeting the predominance requirement of Rule 23(b)(3). (Pet. at 26) *See Alvarado v. Carnation Co.*, 1995 U.S. Dist. LEXIS 10084 (D. Idaho June 23, 1995). *Alvarado*, however, contained no analysis on the punitive damage issue, and we submit that its conclusion is against the weight of authority. *Id.* at *20. The remaining punitive damage cases relied on by plaintiffs either are not class actions at all or did not address the issue of class certification. (Pet. at 26) Moreover, *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), has been called into question in the Eleventh Circuit. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir.) (holding that because *Tapscott's* discussion of punitive damages cannot be reconciled with prior precedent in Eleventh Circuit, *Tapscott* could not be followed), *cert. denied*, 121 S. Ct. 381 (2000).

preserved. *See also Allison*, 151 F.3d at 418 ("Given the degree to which recovery of compensatory and punitive damages requires individualized proof and determinations, they clearly do not qualify as incidental damages in this case.").

II. The *McDonnell Douglas* Model for a Prima Facie Case of Racial Discrimination Has No Bearing on the Issue of Class Certification

In an attempt to manufacture a circuit split where none exists, plaintiffs cite six cases -- none of which is a class action -- for the proposition that *McDonnell Douglas* is applicable to non-employment discrimination cases. (Pet. at *i*, 15-20) Nothing in the Eleventh Circuit's decision, however, holds otherwise.

McDonnell Douglas was *not* a class action. Nor did it even refer to the requirements for class certification. In *McDonnell Douglas*, this Court merely held that an individual plaintiff could establish a prima facie case of racial discrimination, under the particular facts of that case, by showing: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after the rejection, the position remained open and the employer continued to seek applicants. 411 U.S. at 802.[12]

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[12] Significantly, this Court noted in *McDonnell Douglas* that the elements of a prima facie showing of employment discrimination set forth in that case "is not necessarily applicable in every respect to differing factual situations." *Id.* at 802. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2105 (2000) (noting that Court had not squarely addressed whether *McDonnell Douglas* applies to

(continued...)

Once the plaintiff establishes a prima facie case, the *McDonnell Douglas* method of proof shifts the burden to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.*

Nowhere in its opinion did the court below hold that *McDonnell Douglas* could never be applicable to non-employment discrimination cases.[13] Instead, in explaining why a showing of a discriminatory policy by Avis would not establish liability as to individual members of the putative class, the court merely stated that the plaintiffs here will have to show an intent to discriminate by Avis as part of their prima facie case. (Pet.

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[12] (...continued)
age discrimination actions).

[13] Consistent with the six cases cited by plaintiffs, the Eleventh Circuit has previously applied *McDonnell Douglas* to non-employment discrimination cases. *See, e.g., Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991) (application for automobile dealership); *Secretary, United States Dep't Hous. & Urban Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) (case brought under federal Fair Housing Act). Thus, even if the Eleventh Circuit had held otherwise in this case, there still would be no conflict between the Eleventh Circuit and the circuits that issued the six decisions cited by plaintiffs as the earlier Eleventh Circuit decisions would remain controlling in the circuit. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir.) ("[W]here two prior panel decisions conflict we are bound to follow the oldest one"), *cert. denied*, 121 S. Ct. 381 (2000).

at 15a-16a)[14] The significance of this statement lies only in its recognition that plaintiffs' burden to show discriminatory intent will necessitate individualized inquiry, thereby precluding a finding that common issues predominate as required by Rule 23(b)(3). *See Burdine*, 450 U.S. at 253. Whether this showing is made as part of plaintiffs' prima facie case or at another stage in the proceeding is beside the point. Either way, the ultimate factual issue to be decided on a case-by-case basis is whether each challenged conduct was motivated by discriminatory intent. *See United Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (once plaintiff establishes prima facie case, *McDonnell Douglas* presumption "drops from the case" and ultimate factual issue for court is whether defendant intentionally discriminated against plaintiff); *Stewart v. Adolph Co.*, 217 F.3d 1285, 1287 (10th Cir. 2000) ("On the merits, the burden shifting framework of *McDonnell Douglas* is largely irrelevant and the issue is whether the adverse employment action was motivated by race."), cert. denied, 121 S.Ct. 774 (2001); *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984) (noting that *McDonnell Douglas* formula "does not compartmentalize the evidence so as to limit its use to only one phase of the case").

Accordingly, the decision below does not conflict with *McDonnell Douglas*, and does not warrant review by this Court.

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[14] The term "prima facie case" has two meanings. It could mean the establishment of a rebuttable presumption pursuant to *McDonnell Douglas*, and it could also be used to describe the plaintiff's burden of producing enough evidence to go to a jury. *See Burdine*, 450 U.S. at 254 n.7.

CONCLUSION

For the foregoing reasons, Avis respectfully submits that the petition for certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ZEIREI AGUDATH ISRAEL and LEVI SUFRIN,
on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

AVIS RENT A CAR SYSTEM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioners Zeirei Agudath Israel ("ZAI") and Levi Sufrin respectfully submit this brief in reply to Respondent Avis Rent A Car Inc.'s ("Avis") brief in opposition to ZAI and Levi Sufrin's Petition for a Writ of Certiorari ("Avis Opp.").

INTRODUCTION

The importance of this case, and the need for this Court to grant certiorari, arise from Avis' establishment of its unlawful "Yeshiva" policy — a company-wide policy of blatantly unlawful discrimination in violation of Section 1981 — and the Eleventh Circuit panel's decision below reversing the District Court's certification pursuant to subdivisions (a) and (b)(3) of Federal Rule of Civil Procedure 23 ("Rule 23"). The cert-worthy legal and public policy issues underlying this Petition are not, as Avis would have it, the result of "medieval alchem[y]," nor did the Eleventh Circuit panel decision "merely involve[ ] a routine application of Rule 23." Avis Opp. at 17.

Avis stubbornly refuses to recognize the critical importance of this Court's holding in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) to disparate treatment discrimination cases brought as class actions under Rule 23, whether or not the unlawful discriminatory practice involves employment. Similarly, Avis does not squarely address the significance of the Eleventh Circuit panel's erroneous analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as being applicable only to employment discrimination, as opposed to other types of illegal discrimination.

What is at stake in this case is the determination of the procedural means and evidentiary methods available to private parties to enforce the Nation's anti-discrimination civil rights laws effectively in our federal courts. The decision below directly puts into issue the applicability of the *Teamsters* class-wide presumption of intentional discrimination based upon a showing of a "pattern or practice" of discrimination, to

certification under Rule 23. It also directly puts into question whether the burden shifting rules for a *prima facie* discrimination case in an individual action, established by the Court in *McDonnell Douglas*, are uniquely applicable to employment discrimination, the position taken by the Eleventh Circuit panel, or are applicable to other types of unlawful disparate treatment discrimination cases, the position taken by the Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits.

Avis opposes the Petition based largely on: (a) attempts to minimize the significance and perniciousness of Avis' admitted "Yeshiva" policy; (b) self-servingly edited snippets of deposition testimony; (c) conclusory assertions of fact not established in the record; and (d) complaints about Avis' unsuccessful attempts to extinguish this case early through motion practice. None of these arguments are appropriate in this Court, nor are any of them even relevant to the issue of whether this case is worthy of certiorari.

Avis' merits arguments defending its Yeshiva policy and its litany of complaints about adverse procedural rulings in the District Court, do nothing to undercut the importance and seriousness of these issues. Moreover, in making its arguments, Avis has tellingly omitted a number of record facts, for example:

• In support of its "categorical" denials of discrimination (but not the existence of its "Yeshiva" policy), Avis cites a March 7, 1997 *Newsday* article reporting that the Anti-Defamation League of B'nai Brith did not believe that Avis had a policy of discriminating against Jews. Avis Opp. at 2 n.3. Avis neglects to point out, however, that this case was not filed until weeks after the article — and that therefore the ADL was not and could not know the full extent of the charges against Avis, or about the written evidence documenting its unlawful Yeshiva policy. Indeed, the *Newsday* article does not even suggest that the ADL had investigated the charges underlying this action, noting only that the CEO of Avis' corporate parent had assured the ADL

that the charges "were being taken seriously." (Supp. R. IX-194, Ex. A.)[1] Neither did Avis report that the article also quoted Israel Abraham, a New York Jewish leader, as stating: "Avis, you are Number Two, and now we know the reason. . . . The only thing you try harder is to discriminate." (*Id.*)[2]

• Avis plaintively complains about the outcome of various motions in the District Court, including the denial of Avis' motions to dismiss, for summary judgment, and to transfer the case to Oklahoma, and the granting of Petitioners' motion for ZAI to intervene as a plaintiff and class representative after it had become apparent that the original plaintiff, Ruttstein, had abandoned the action. Apparently seeking to portray the District Court as a forum unfairly hostile to Avis, Avis leaves out of its lengthy procedural history the fact that on May 1, 1998 Avis filed a lengthy petition for mandamus with the Eleventh Circuit challenging the District Court's denial of Avis' motion to transfer and the granting of ZAI's motion to intervene. And that on May 15, 1998, the Eleventh Circuit denied Avis' petition.

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1. The "R" and "Supp. R" citations refer to the volume number of the original record, docket number, and where applicable, the exhibit or tab within the document and/or the page number.

2. In this same vein, while vehemently denying that its Yeshiva policy had anything to do with discriminatory practices, and implying support from the ADL for its denials, Avis never mentions that *amici* briefs were filed in the Eleventh Circuit on behalf of ZAI and Sufrin by the N.A.A.C.P., the American Jewish Congress, the Georgia State Conference of the N.A.A.C.P., the Mexican American Legal Defense and Educational Fund, the National Council of Jewish Women, the National Organization of Women Legal Defense and Education Fund, and the Rainbow Push Coalition.

ARGUMENT

I.

THE *TEAMSTERS* DECISION IS DIRECTLY RELEVANT TO RULE 23 CLASS CERTIFICATION IN THIS CASE.

Avis relies on an amalgam of three unrelated, but equally mistaken, arguments in support of its assertion that the panel's decision below does not conflict with *Teamsters*. Avis claims that: (a) *Teamsters* does not even address Rule 23 (Avis Opp. at 18-19); (b) the Eleventh Circuit panel's result was "mandated" by *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), a case not challenged in this Petition, and, which, in any event, cannot justify a result in conflict with a decision of this Court. (*id.* at 19-24); and (c) *Teamsters* is distinguishable based on the distinction between equitable and legal relief (*id.* at 24-27).

First, the claim that "*Teamsters* does not address Rule 23" could not be further from the fact. Even the panel below expressly acknowledged that it "is clear that *Teamsters* applies in private class actions." Pet. App. at 20a. Indeed, the *Teamsters* burden shifting procedure was first applied by this Court in a private class action, *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). In the course of reversing a District Court's denial of certain relief to unnamed numbers of a private class asserting job discrimination claims, the Court stated:

> We read [the] District Court[ ] . . . . [as] express[ing] concern that some of the *unnamed class numbers* . . . . may not in fact have been actual victims of racial discrimination . . . . Generalizations concerning such individually applicable evidence cannot serve as justification to deny relief *to the entire class* . . . . [P]etitioners here have carried their

> burden of demonstrating the existence of a discriminatory hiring practice by the respondents and, therefore, the burden will be on the respondents to prove that individuals who reapply were not in fact victims of previous hiring discrimination.

424 U.S. at 772 (emphasis added); *id.* at 773 n.32 (respondent may attempt to prove a given individual member of the class not discriminated against "in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally"). *See also Teamsters*, 431 U.S. at 362 (the burden shifting in this government prosecuted case was the same "[a]s in *Franks*").

Second, Avis faults Petitioners for not arguing that the *Jackson* case was incorrectly decided and also claims that "plaintiffs . . . have abandoned their argument that *Jackson* is distinguishable from this case." Avis Opp. at 24. The former proposition is irrelevant: Petitioners are not seeking review of *Jackson*, but of the panel decision in *Israel*. The latter proposition is wrong: Petitioners credited the District Court for having correctly "recognized the fundamental difference between this case and [*Jackson*]" — *i.e.*, the difference between a case based on numerous separate acts of wrongdoing anecdotally reported by individual plaintiffs (as in *Jackson*), and this case, in which there is "significant proof of a company-wide discriminatory policy." Petition at 5-7 (citations omitted). Whether or not *Jackson* was correctly or incorrectly decided is not relevant to this Petition.[3]

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3. Avis nevertheless relies heavily not only on *Jackson v. Motel 6*, but also on *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), a Fifth Circuit case with no binding effect on *any* court in the Eleventh Circuit let alone on this Court:

> In the final analysis, plaintiffs are attempting to circumvent *Jackson* and *Allison* by seizing on the burden-shifting framework of *Teamsters* as support for their proposition

(Cont'd)

Avis mischaracterizes and distorts both Petitioners' position in this case and this Court's holding in *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982). As the District Court correctly found, this case does not rest on a mere "allegation" of a company-wide policy of discrimination. To the contrary, the record of Avis' Yeshiva policy does precisely what this Court demanded in *Falcon*; it "bridge[s] the gap" between the individual experience of discrimination by a plaintiff or group of plaintiffs and Avis' establishment and implementation of a company-wide policy of unlawful discrimination. *Falcon*, 457 U.S. at 157-59.

Third, Avis' argument that differences between equitable remedies and "money damages" distinguishes this case from *Teamsters* fails for the same reasons the Eleventh Circuit panel's identical holding is in error. *See* Petition at 23-26. Apart from the panel decision itself, Avis has only the *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) case from the Fifth Circuit, and two District Court cases to support its mistaken assertion that even punitive damages raise individual issues that preclude a finding of the predominance required under Rule 23(b)(3). Avis Opp. at 25-26. In a misguided effort to broaden this thin reed, Avis then goes on — disingenuously — to represent *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir.), *cert. denied*, 121 S. Ct. 381 (2000), as having "called into question" the Eleventh Circuit's recognition that punitive damages are, indeed, a class-wide remedy. Avis Opp. at 25-26 and n.11.[4]

(Cont'd)

> that an allegation of a policy of discrimination above is sufficient to warrant class certification. That is simply not the law.

Avis Opp. at 24, citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982).

4. *Cohen* does no such thing. Rather, it addresses that propriety of "aggregating" punitive damages in a class case for purposes of calculating the "amount in controversy" for diversity jurisdiction. (Cont'd)

II.

THE DECISION BELOW CONFLICTS WITH SIX OTHER COURTS OF APPEALS.

Avis tries to avoid the palpable split in the Circuits created by the Eleventh Circuit's decision by simply closing its eyes to the panel's detailed analysis of specific employment related elements of *McDonnell Douglas* as a means to justify distinguishing this case from both *McDonnell Douglas* and *Teamsters*, and thus denying Petitioners the class-wide presumption of intentional discrimination that arises from evidence of a corporate pattern and practice of discrimination. *See, e.g.*, Pet. App. at 22a-26a. The panel below bases its distinction on the fact that Petitioners' claims arise from *non-employment* related discrimination, which, according to the panel, is not amenable to the same burden shifting rules that apply to employment discrimination claims. *Id.* Avis ignores the panel's lengthy discussion of the interplay and relationship between the allocation of burdens in a class employment discrimination case, as in *Teamsters*, and in an individual employment discrimination case, as in *McDonnell Douglas*. Pet. App. at 22a-26a. The linchpin of the panel's analysis — and its result — is its holding that the burden shifting rules in *McDonnell Douglas* and *Teamsters* are appropriate for employment, but not for non-employment, discrimination cases. Pet. App. at 25a-26a.

Avis is far off the mark when it claims that the panel's reliance on *McDonnell Douglas* "merely stated that the plaintiff

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(Cont'd)

Specifically, the Eleventh Circuit held that a punitive damages claim must be divided by the number of alleged class members for amount in controversy purposes — a holding that supports rather than undermines punitive damages as a uniform class-wide remedy involving questions that predominate over individual questions. *See Cohen*, 204 F.3d at 1076-77.

here will have to show an intent to discriminate by Avis as part of their *prima facie* case." Avis Opp. at 28-29 (citing Pet. App. at 15a-16a, a section of the panel's decision that discusses *McDonnell Douglas* only in a footnote; tellingly, Avis *never* discusses the panel's later detailed analysis and discussion of *McDonnell Douglas* (*see* Pet. App. at 22a-26a.)).

Aside from ignoring the panel's dispositive (and erroneous) interpretation of *McDonnell Douglas*, the only other argument Avis advances against there being a Circuit split is based on two earlier decisions by Eleventh Circuit panels affirming the use of *McDonnell Douglas* burden shifting in non-employment discrimination cases. Avis Opp. at 28 n.13. Avis argues that because in the Eleventh Circuit a panel cannot overturn an earlier panel holding, to the extent the decision below conflicts with holdings of other Circuits it is really of no significance. *Id.* Unlike the decision below, however, neither of the earlier Eleventh Circuit panel decisions did more than summarily affirm the use of *McDonnell Douglas* burden shifting without *any* analysis or discussion. *See Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991); *Secretary, United States Dep't Housing & Urban Dev. ex rel. Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). In contrast, the decision below, which already has been cited by courts within and without the Eleventh Circuit,[5] elaborately articulates a line of erroneous reasoning, interpretation, and analysis of two of this Court's precedents

5. *E.g.*, *Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (granting Rule 23(f) petition); *Moore v. American Federation of Television & Radio Artists*, 216 F.3d 1236, 1243 (11th Cir. 2000) (affirming denial of class certification); *Simon v. Philip Morris Inc.*, 2001 U.S. Dist. LEXIS 1114 at *72 (E.D.N.Y. Feb. 8, 2001) (Rule 23(f)); *Miller v. Hygrade Food Products Corp.*, 2001 U.S. Dist. LEXIS 733 at *18-*20 (E.D. Pa. Jan. 29, 2001) (denying motion to certify a Rule 23(b)(3) class in a Title VII case); *Neenan v. Carnival Corp.*, 2001 U.S. Dist. LEXIS 885 at *11-*15 (S.D. Fla. Jan. 23, 2001) (denying Rule 23(b)(3) certification motion); *Shelley v. AmSouth Bank*, 2000 U.S. Dist. LEXIS 11429 at *19, *22-*23 (S.D. Ala. July 25, 2000) (denying Rule 23(b)(3) certification).

— *McDonnell Douglas* and *Teamsters* — that is in conflict with decisions from six other Courts of Appeals. This case presents exactly the type of unsettled uncertainty in a critical area of the law that calls for resolution by this Court.

CONCLUSION

For all of the foregoing reasons, and for the reasons in the original Petition, the Petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

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